Supreme Court, U.S.
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No. 95- OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KEYSTONE SANITATION COMPANY, INC., *et al.*,
Petitioners,

v.

ARCATA GRAPHICS FAIRFIELD, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the disclosure of documents subject to the attorney-client privilege waives the privilege with respect to those documents, as well as other undisclosed privileged documents on the same subject, where the disclosed documents were produced inadvertently by counsel and without the knowledge or consent of the client.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

Petitioners are Keystone Sanitation Company, Inc., Kenneth F. Noel, and Anna M. Noel. They were petitioners before the United States Court of Appeals for the Third Circuit and defendants in the United States District Court for the Middle District of Pennsylvania. Pursuant to S. Ct. Rule 29.1, petitioner Keystone Sanitation Company, Inc., notes that it has no parent companies or non-wholly owned subsidiaries.

Arcata Graphics Fairfield, Inc. (now known as Quebecor Printing Fairfield Inc.) was a respondent before the Court of Appeals and a defendant in the District Court, and is a respondent before this Court. The District Court understood Arcata to be acting in connection with this dispute on behalf of itself and co-defendants C & J Clark America, Inc., the Esab Group, Inc., The Genlyte Group, Inc., Hanover Bronze and Aluminum Foundry, Inc., Kemper Industries, Inc., R.H. Sheppard Company, Inc., and SKF USA, Inc.

In addition to these companies, other defendants in the underlying litigation, who did not participate in the dispute that is the subject of this petition either in the District Court or the Court of Appeals, are Advanced Disposal Service, Aero Oil Company, Agricultural Commodities, Inc., d/b/a or f/d/b/a Agcom, Inc., Agway Petroleum, American National Can, Ames Department Store, Amp Inc., Andgrow Fertilizer, Inc., Arentz Roofing, Aristokraft, Inc., B & B Auto Body Shop, B & K Trucking, Inc., Bair Wooden Products, Baltimore Gas & Electric, Baum & Hersh Association, Inc., Beeler Box Company, d/b/a or f/d/b/a Beeler Manufacturing, Bermudian Springs School District, Bethenergy Mines Corporation, formerly operating as Bethlehem Mines Corporation, Bibb Co., Inc., d/b/a or f/d/b/a Malcolm Spinning Co., Biglerville Schools Upper Adams County School District, Black's Sunoco, Inc., Blue Bird Fabric Corporation, Bon-Ton Foods, Inc., Biglerville Borough, Bonneau-

ville Borough, Dillsburg Borough, Borough of East Berlin, Borough of Gettysburg, Hanover Borough, Borough of Lemoyne, Littlestown Borough, Borough of New Oxford, Borough of York Springs, Breams Print Shop, Brooks Show Company, Cadbury Beverages, Inc., successor to and formerly doing business as Duffy Mott Company, Inc., Cambridge Rubber Company, Capital Products, also or formerly known as Ethyl Corp., Clyde A. Wenschhof, Jr., Coldsmith Roofing, Colonial Shoe Company, Colonial Fiberglass, Columbia Gas Transmission Company, Conewago Contractors, Inc., Conewago Township, Continental Wire & Cable, also or formerly kown as Anaconda-Ericson, Coulsen Heel Company, Cramer Zeigler Tire Company, CSX Transportation, formerly known as, and successor to, Western Maryland Railway Company, D.K. Hershey, Dal-Tile Corporation, Del-Wood Kitchens, Der-Text of Pennsylvania, Donald B. Smith, Doubleday Book & Music Club, Inc., Duplex Products, Inc., Earl Barnhart Contractors, Eastern Waste Industries, Eddie's Cleaners, Eicholtz Co., Eisenhart Wallcoverings Company, Emeco Industries, Inc., F & W Blacktopping, Foster Stonseifer Sanitation, Freeman Shoe Company, Gam Printing, Gerlach Insulation, Germantown Refuse, Germany Township, Gettysburg College, Gettysburg Hospital, Gettsyburg Transformer, The Gettysburg Times, Gettysburg Municipal Authority, Gettysburg Area School District, Giant Foods, Gobrecht Trash Removal, Inc., Goodyear Tire Center, Grover Hansford, Guildcraft, Inc., d/b/a Guildcraft Furniture & Bedding, Hanover Brands, Hanover District, Inc., Hanover General Hospital, Hanover Industrial Machine, Hanover Industries, Hanover Klondike, Hanover Pen, Hanover Potato Products, Inc., Hanover Transfer Company, Hanover Wire Cloth, HBH Contractors, Inc., Heidelburg Township, Henson Paving Company, Inc., Herff Jones Yearbooks, Hill's Stores, d/b/a or f/d/b/a Hills Department Stores, Inc., H.M. Kelley, Inc. Trucking, Hoffheins Brothers, Hostetter Construction Corporation, Inland Container, Jamesway Corporation, J.A. Myers Building and Development, Inc., J.F. Rohr-

baugh & Company, Inc., John Jacobs, K-Mart Corp., Knouse Foods Cooperative, L.M. Klunk & Sons, Leinhardt Brothers Furniture, Lionel Kiddie City, Littlestown Laundry, Littlestown Pattern Works, Littlestown Hardware & Foundry, Lowe's Home Centers, Inc., Master Roofers, Inc., McClarin Plastics, McSherrystown Borough Office, Menellan Township, Metropolitan Edison, Miller Chemical and Fertilizer Corp., Mobil Oil Corp., d/b/a or f/d/b/a Electro-Phosphorus Co., Montgomery County Sanitation, for itself and as successor to Lake Forest East Village Refuse, Inc., Morton Building Plant, Mount Pleasant Township, Neiderer Sanitation, Nell's, Inc., Nevin L. Barnhart Contractors, New Oxford Municipal Authority, Oxford Township Municipal Building, Oxford Container Company, Commonwealth of Pennsylvania Department of Environmental Resources, Commonwealth of Pennsylvania Department of Environmental Resources, Bureau of State Parks, Cocorus State Park, Commonwealth of Pennsylvania, Department of Transportation, Commonwealth of Pennsylvania Department of Military Affairs, Paradise Township, Penn Auto Body Shop, Penn Township, Penn Township Waste Water Treatment Plant, Penn-Marr Castings, Ray Mar Roofing, Refuse Removal Service, Rental Uniform Service, Robert A. Kinsley, Inc., Round Hill Foods, Inc., Schindler Corp., Schmucks, Schuchart Oil and Propane Sealed Air Corporation, also or formerly known as Jiffy Packaging Company, Seneca Valley Refuse, Shepherd Aluminum Products, Sheridan Press, Sketchley Services, Inc., also or formerly known as Coyne and/or Rentex Corporation, Ski Liberty, Snyder's of Hanover, Inc., formerly known as Hanover Guest Quality, Inc., Sonoco Products Company, Spectrakote Corporation, Superior Plating, Sylvania Shoe, The Lumber Yard, Thomas B. Lawyer, 3-D Manufacturing, Titus Trash Removal, Trimen Industries, Inc., Union Township, United Disposal Corporation, U.S. Shoe Corp., successor to and f/d/b/a Freeman Shoe Company, Utz Potato Chip Company, Village Disposal, Inc., Waste Management of Pennsylvania, Wildason Roofing & Re-

modeling, City of York, York Waste Disposal, Inc., and York Graphic Services, Inc.

The plaintiff in the underlying litigation, which also did not participate in the instant dispute either in the District Court or the Court of Appeals, is the United States of America. The District Court judge—the Hon. Sylvia H. Rambo—was also a nominal respondent in the mandamus action before the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Keystone Sanitation Company, Inc., Kenneth F. Noel, and Anna M. Noel respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The order of the Court of Appeals for the Third Circuit denying mandamus is unreported and is reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Middle District of Pennsylvania is reprinted at App. 11a, and its opinion denying reconsideration is reprinted at App. 17a. Both opinions are reported at 885 F. Supp. 672.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1995. App. 1a. The Court of Appeals denied a timely petition for rehearing and suggestion of rehearing in banc on June 9, 1995. *Id.* at 6a. The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1651. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT RULE

Rule 501 of the Federal Rules of Evidence provides in pertinent part: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

STATEMENT OF THE CASE

The present dispute arose out of litigation brought by the United States in late 1993 under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.* The litigation was brought against petitioners Keystone Sanitation Company, Inc., and its owners Kenneth F. Noel and Anna M. Noel (collectively "Keystone")—the owners of a landfill facility—and against respondent Arcata Graphics Fairfield, Inc. ("Arcata") and seven other companies (collectively "the Generator Defendants")[1] alleged to have generated hazardous waste that

[1] The Generator Defendants include, in addition to Arcata, C & J Clark America, Inc., The Esab Group, Inc., The Genlyte Group, Inc., Hanover Bronze and Aluminum Foundry, Inc., Kemper Industries, Inc., R.H. Sheppard Co., and SKF USA, Inc.

was transported to the facility. The Generator Defendants cross-claimed against Keystone,[2] and discovery commenced in January 1994. In connection with the deposition of a representative of Keystone Sanitation, Arcata sought documents regarding Keystone's June 1991 sale of certain assets to Waste Management, Inc. ("Waste Management"). Robert B. Hoffman of Reed Smith Shaw and McClay—counsel for Keystone—assembled and reviewed what he believed to be the responsive documents from the files of various Reed Smith attorneys involved in the Waste Management transaction. The documents produced completely filled two 10″ x 12″ x 16″ cardboard storage cartons. Exhibit F to Petition for Mandamus, at 5-6.

Inadvertently included among those documents were printed copies of two internal electronic mail ("e-mail") messages sent between Reed Smith attorneys. One states: "I see out [sic] major goal, apart from defending the environmental liability claims, is to encourage the Noels to take as much out of the corporation as they legitimately can do." App. 13a. Another e-mail contains a message stating that Florida law exempts a principal residence from levy by creditors in an unlimited amount. *Id.* Arcata subsequently requested that Keystone produce, among other things, billing statements of Reed Smith for legal services performed for Keystone from 1991 to the present in connection with any transfer of assets. Keystone agreed to produce such statements, with the identities of counsel and narrative descriptions of the services performed redacted. Keystone explained that the attorney-client privilege protected these portions of the billing statements from disclosure.[3]

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[2] The Generator Defendants also filed a third-party complaint against numerous other potentially responsible parties. *See supra* at ii-v.

[3] The District Court agreed that "the billing statements as [respondents] wish them to be produced would be protected by the

Dissatisfied with this production, Arcata moved to compel discovery of the unredacted billing statements. App. 12a. Arcata argued that the attorney-client privilege had been waived with respect to the billing statements because of the prior disclosure of the two e-mail messages. Arcata asserted that "[m]any courts have recognized that inadvertence is not an excuse that precludes a waiver," and argued that "[e]ven if the Court were to accept the line of authority that inadvertence may be an excuse in some situations," it should nonetheless still find a waiver. Exhibit D to Petition for Mandamus. Keystone contended that the e-mail messages were not subject to the attorney-client privilege, so their production could not form the basis for any finding of waiver. Alternatively, Keystone argued that the two messages

> constitute at most inadvertent production in a mass of material totalling about 10,000 pages, rather than a purposeful and selective disclosure of privileged communications. The clients did not participate in that document production, which related to Reed Smith files, and thus did not themselves consent to any waiver. [Exhibit C to Petition for Mandamus.]

In its Memorandum and Order of October 19, 1994, the District Court ruled that the inadvertently produced e-mail messages were subject to the attorney-client privilege, and that their prior production had waived the privilege with respect to any legal advice relating to Keystone's disposition of its assets. The Court accordingly ordered production of the unredacted billing statements. App. 16a.

The District Court began its analysis by noting that "[i]nadvertent disclosure may or may not require a finding of waiver," stating that "[m]any courts" look to a

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attorney-client privilege, absent a waiver." App. 14a. The court did not reach a decision on whether the identities of counsel performing services, standing alone, would be privileged. *Id.* at 14a n.1.

five-factor balancing test "to determine whether a document has lost its privilege through inadvertent disclosure." *Id.* at 14a. Applying this multi-factor test, the trial court concluded that "[t]he balance * * * weighs in favor of holding that the Keystone Defendants have waived any privilege that may have protected their attorneys' billing statements from disclosure with respect to the narrative of services and identities of attorneys performing services." *Id.* at 16a.

On reconsideration, the District Court acknowledged that its "decision was a difficult one, in the first place," but on review found itself "constrained to adhere to its prior ruling." *Id.* at 19a. The court granted a stay of its discovery order "to afford the Keystone Defendants the opportunity to petition the Third Circuit Court of Appeals for a Writ of Mandamus" on the waiver issue. *Id.* at 21a.

In their petition for mandamus, petitioners sought an order directing the District Court to vacate its order and to enter an order denying Arcata's motion to compel discovery of attorney-client communications. Petition for Mandamus, at 6. Petitioners reiterated their argument that the disclosure of the two e-mail messages could not waive the privilege because the messages themselves were not privileged.[4] Petitioners also reiterated their alternative argument that, even if the e-mail messages were privileged, their disclosure did not result in a waiver of the privilege with respect to the billing statements, because the disclosure of the e-mail was inadvertent.[5] The Third Circuit denied the petition for mandamus on May 12,

[4] Petitioners do not raise that argument here. As this case comes to this Court, therefore, it is undisputed that the e-mail messages were covered by the attorney-client privilege.

[5] In arguing that the inadvertent disclosure did not "waive[] [petitioners'] attorney-client privilege with regard to communica-

1995, *id.* at 1a, and denied a timely petition for rehearing on June 9, 1995. *Id.* at 6a.

REASONS FOR GRANTING THE WRIT

This case presents the straightforward legal questions whether the inadvertent disclosure of documents protected by the attorney-client privilege results in a waiver of that privilege and, if so, whether that waiver is limited to the documents inadvertently disclosed or extends to additional, otherwise privileged documents on the same subject that were not disclosed. These questions—which arise with increasing frequency in the federal courts—have precipitated a sharp conflict among the courts of appeals, a conflict expressly recognized by those courts, the district courts, and the commentators. The courts have acknowledged three quite distinct approaches to the initial question whether inadvertent disclosure results in waiver of the privilege. The courts have further split on the separate question whether any such waiver extends only to the documents inadvertently disclosed or covers other privileged documents on the same subject that were not disclosed. This case presents an opportunity for the Court to resolve both conflicts. It should grant the petition to do so.

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tions with their counsel concerning their rights and liabilities with regard to transfers of their assets," Petition for Mandamus, at 1, petitioners focused upon the billing statements for the simple reason that those statements were the subject of respondent Arcata's motion to compel and the resulting District Court decision. As explained below, *see infra* at 24, the fact that this case concerns the effect of the inadvertent disclosure on the privileged status of documents other than those disclosed is a compelling reason to grant review, because it affords this Court the opportunity to resolve both the conflict among the Circuits over whether an inadvertent disclosure waives the privilege and, if so, the conflict over whether any such waiver extends beyond the documents actually disclosed to other undisclosed privileged documents.

I. THE FEDERAL COURTS ARE DIVIDED AS TO THE EFFECT OF AN INADVERTENT DISCLOSURE OF INFORMATION PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND HAVE ADOPTED THREE DIFFERENT APPROACHES THAT LEAD TO SHARPLY DISPARATE RESULTS

In its October 19, 1994, Memorandum and Order, the District Court determined that Keystone had waived the attorney-client privilege because its counsel had produced the e-mail messages, even though that production was concededly inadvertent. In so doing, the court applied a five-factor test which it said "[m]any courts use * * * to determine whether a document has lost its privilege through inadvertent disclosure." App. 14a. As the District Court implicitly and correctly recognized, there is a split of authority in the federal courts as to the effect of an inadvertent disclosure of privileged documents.

Some courts apply the rule that any disclosure of information protected by the attorney-client privilege to a third party waives the privilege, whether or not the disclosure was inadvertent. *See In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) ("We * * * agree with those courts which have held that the privilege is lost 'even if the disclosure is inadvertent' ") (citation omitted); *Texaco Puerto Rico, Inc.* v. *Department of Consumer Affairs*, No. 94-2076, 1995 WL 415422, *15 (1st Cir. July 19, 1995); *FDIC* v. *Singh*, 140 F.R.D. 252, 253 (D. Me. 1992); *see also Carter* v. *Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (en banc) (dicta); *United States* v. *Ryans*, 903 F.2d 731, 741 n.13 (10th Cir.) (same), *cert. denied*, 498 U.S. 855 (1990).

Other courts employ the approach taken by the District Court in this case and consider the factual circumstances surrounding an inadvertent disclosure to determine if the privilege has been waived. *See, e.g., Alldread* v. *City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) ("In our view, an analysis which permits the court to consider

the circumstances surrounding a disclosure on a case-by-case basis is preferable to a *per se* rule of waiver."); *Rotelli* v. *7-Up Bottling Co. of Philadelphia,* No. 93-6957, 1995 WL 234171, *2 (E.D. Pa. April 19, 1995); *Edwards* v. *Whitaker,* 868 F. Supp. 226, 229 (M.D. Tenn. 1994); *In re Grand Jury Investigation,* 142 F.R.D. 276, 279 (M.D.N.C. 1992).

Still other courts hold that an inadvertent disclosure of privileged information does not waive the privilege. *See John Morrell & Co.* v. *Local Union 304A,* 913 F.2d 544, 556 (8th Cir. 1990) (party's express "waiver as to four documents did not waive its privilege as to the rest. The fact that the [opposing party] inadvertently gained access to the other documents does not affect this ruling."); *United States* v. *Ankeny,* 30 M.J. 10, 15-17 & n.6 (C.M.A. 1990); *United States* v. *Zolin,* 809 F.2d 1411, 1417 (9th Cir. 1987) (secretary's inadvertent delivery of tapes containing privileged material under mistaken impression tapes were blank "was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver"), *aff'd in part and vacated in part,* 491 U.S. 554 (1989);[6] *Georgetown Manor, Inc.* v. *Ethan Allen, Inc.,* 753 F. Supp. 936, 938 (S.D. Fla. 1991); *Helman* v. *Murry's Steaks, Inc.,* 728 F. Supp. 1099, 1104 (D. Del. 1990); *Kansas-Nebraska Natural Gas Co.* v. *Marathon Oil Co.,* 109 F.R.D. 12, 21 (D. Neb. 1985); *Mendenhall* v. *Barber-Greene Co.,* 531 F. Supp. 951, 954-955 (N.D. Ill. 1982); *Connecticut Mut. Life Ins. Co.* v. *Shields,* 18 F.R.D. 448, 451 (S.D.N.Y. 1955).

Among those courts concluding that an inadvertent disclosure can waive the privilege, there is a further conflict concerning the *scope* of the waiver that results from such

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[6] In *Zolin* this Court noted that the Ninth Circuit's holding "that the privilege had not been waived when the [privileged materials] were inadvertently given" to a third party was "not at issue here." 491 U.S. at 563.

a disclosure. Some courts apply the rule that an inadvertent disclosure of privileged materials waives the privilege with respect to all other communications on the same subject matter as the disclosed materials. *See Texaco Puerto Rico, Inc., supra,* at *15; *Sealed Case,* 877 F.2d at 981; *Santrade, LTD* v. *General Elec. Co.,* 150 F.R.D. 539, 544 (E.D.N.C. 1993). Other courts, however, have held that an inadvertent disclosure waives the privilege only with respect to the documents actually disclosed. *See Martin* v. *Valley Nat'l Bank of Arizona,* No. 89 Civ. 8361, 1992 WL 196798, *4 (S.D.N.Y. Aug. 6, 1992); *FDIC* v. *Marine Midland Realty Credit Corp.,* 138 F.R.D. 479, 484 (E.D. Va. 1991); *Golden Valley Microwave Foods, Inc.* v. *Weaver Popcorn Co.,* 132 F.R.D. 204, 208 (N.D. Ind. 1990); *Parkway Gallery Furniture, Inc.* v. *Kittinger/Pennsylvania House Group, Inc.,* 116 F.R.D. 46, 52 (M.D.N.C. 1987); *Standard Chartered Bank PLC* v. *Ayala Int'l Holdings (U.S.) Inc.,* 111 F.R.D. 76, 85 (S.D.N.Y. 1986).[7] The District Court in this case adopted the former approach when it ordered Reed Smith to disclose unredacted copies of its billing statements related to Keystone's disposition of its assets, solely because of the inadvertent disclosure of two e-mail messages allegedly concerning that subject. App. 16a.

These entrenched conflicts over the consequences of the inadvertent disclosure of privileged documents have not gone unnoticed by the federal Courts of Appeals themselves. As the Eighth Circuit recently observed:

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[7] Some of these courts have said that they would find a subject matter waiver if "it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure." *Parkway Gallery,* 116 F.R.D. at 52. To the extent the disclosure was made with a tactical objective, a finding of waiver is not actually a qualification of or exception to the general rule of nonwaiver, because such selective disclosure cannot properly be regarded as "inadvertent" in the first place.

> The issue of whether documents claimed to be privileged may be withdrawn when they are inadvertently produced in discovery is a question of first impression in this Circuit. Courts in other jurisdictions reaching the question have adopted three positions: there is no waiver of the privilege if the document is inadvertently produced because the privilege must be knowingly waived; the privilege is always waived even if the document is inadvertently produced because the confidentiality of the document is lost once the document is produced; or the privilege may or may not be waived depending upon the results of an ad hoc balancing test * * *. [*Pavlik* v. *Cargill, Inc.*, 9 F.3d 710, 713 (1993).[8]]

The Fifth Circuit also acknowledged recently that "[t]here is no consensus * * * as to the effect of inadvertent disclosures of confidential communications," *Alldread*, 988 F.2d at 1434 (citations omitted), and the Court of Military Appeals has observed that "[c]ivilian courts have taken varying positions on the inadvertent-disclosure problem." *Ankeny*, 30 M.J. at 17 n.6 (contrasting, *inter alia*, the Ninth Circuit's decision in *Zolin* with the D.C. Circuit's decision in *Sealed Case*).

Federal district courts, which must apply the privilege and waiver rules in the first instance, have repeatedly remarked upon the unsettled state of the law. As the court explained earlier this year in *Berg Electronics, Inc.*

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[8] The *Pavlik* court did not take a position on the conflict, ruling instead that any error committed below was harmless. 9 F.3d at 713. Although the *Pavlik* court described the issue as one of first impression in the Eighth Circuit, a prior panel had ruled that inadvertent disclosure does not waive the attorney-client privilege. In *John Morrell & Co.*, 913 F.2d at 555-556, the district court ruled that the attorney-client privilege barred the admission at trial of inadvertently disclosed documents. The Court of Appeals affirmed, concluding that an express waiver of the privilege as to certain documents did not extend to others inadvertently disclosed, and "[t]he fact that the [party seeking admission] inadvertently gained access to the other documents does not affect this ruling." *Id.* at 556.

v. *Molex, Inc.*, 875 F. Supp. 261, 262-263 (D. Del. 1995) (citations omitted):

> Courts have followed three general approaches in deciding whether the inadvertent production of a document that contains a confidential attorney-client communication waives the privilege. Some courts have found that inadvertently producing the document does waive the privilege. * * * Other courts have looked to the general circumstances surrounding the disclosure of the documents to determine whether finding a waiver would be fair and reasonable. * * * Still other courts have found that the mere inadvertent production of documents by counsel does not waive the privilege.

The *Berg Electronics* court criticized the first approach as taking from the client the ability to control waiver of the privilege, contrary to Supreme Court precedent, and the second as resulting in an "uncertain privilege" which would invite litigation. The court embraced the third approach, adopting the general rule that inadvertent disclosure does not waive the privilege. *Id.*

The court in *Golden Valley*, 132 F.R.D. at 208, described the question as "a legal thicket which is difficult to chop through," noting that the courts have followed "three divergent paths: a subjective analysis, an objective analysis, and a balancing test." The court in *Marine Midland*, 138 F.R.D. at 480-481, similarly viewed the issue as a "knotty question" that "has spawned three distinct lines of authority." *See also Edwards* v. *Whitaker*, 868 F. Supp. at 228 ("three lines of authority with regard to the claim of inadvertent disclosure"); *Hydraflow, Inc.* v. *Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) ("There are three distinct lines of federal judicial authority on the question of the effect of an inadvertent disclosure."); *In re Grand Jury Investigation*, 142 F.R.D. at 278 ("three distinct lines of authority on the question of whether inadvertent disclosure during discovery proceedings causes a waiver of the attorney-client privilege");

FDIC v. *Singh*, 140 F.R.D. at 253 ("courts have resolved the issue in one of three ways"); *Prudential Ins. Co.* v. *Turner & Newall, PLC*, 137 F.R.D. 178, 182 (D. Mass. 1991) ("courts have resolved the question of whether unintentional disclosure of protected material results in a waiver in three ways"); *Georgetown Manor*, 753 F. Supp. at 937-938 ("the federal courts are divided on the issue of whether an inadvertent disclosure of attorney-client privileged communications by a party's counsel to the adversary is a waiver of the privilege. * * * [T]he better-reasoned rule is * * * that mere inadvertent production by the attorney does not waive the client's privilege."); *Helman*, 728 F. Supp. at 1104 (noting contrary authority but concluding that the "better-reasoned rule * * * provides that inadvertent disclosure does not waive the privilege"); *Kansas-Nebraska Natural Gas*, 109 F.R.D. at 21 (same); *Mendenhall*, 531 F. Supp. at 954 (same); *Strategem Development Corp.* v. *Heron Int'l N.V.*, 153 F.R.D. 535, 544 n.12 (S.D.N.Y. 1994) (noting conflicting cases "from other jurisdictions" but concluding that "[p]ursuant to the law in this District, however, inadvertent disclosure does not result in a waiver of the attorney-client privilege").

Commentators, too, have remarked upon the persistent split of authority. *See* Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 Cath. U. L. Rev. 465, 471 (1993) ("Federal circuit courts of appeal and district courts currently employ three tests for deciding whether the inadvertent production of a privileged document waives the attorney-client privilege"); 8 C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* § 2016.2, at 241 (2d ed. 1994) ("As the courts themselves recognize, they have split into at least three camps" on the advertent disclosure issue); Note, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 Pacific L.J. 59, 60 (1986) (courts "have ap-

proached the [inadvertent disclosure] problem in one of three ways").

Finally, this Court has itself noted the existence of the "controversy concerning the legal effect of an inadvertent disclosure which does not constitute a waiver of the privilege." *United States* v. *Zolin*, 491 U.S. 554, 573 n.11 (1989) (citing *Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1450, 1648, 1660-61 (1985)). The cited work notes that "[c]ourts have taken a variety of waiver approaches to these inadvertent disclosures." *Developments in the Law*, 98 Harv. L. Rev. at 1660.

This is, therefore, not a situation in which the existence of a conflict needs to be inferred from an analysis of allegedly conflicting cases. The Courts of Appeals themselves have expressly acknowledged their disagreement; it has been confirmed by the commentators; and there is no reason to suppose that it will abate in the absence of action by this Court. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals"); S. Ct. Rule 10.1(a).

II. THE CORRECT RULE IS THAT AN INADVERTENT DISCLOSURE DOES NOT WAIVE THE PRIVILEGE

Of the three approaches just described, the rule that an attorney's inadvertent disclosure cannot waive the privilege is the one that has the most to commend it "in the light of reason and experience." Fed. R. Evid. 501. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of the law and administration of justice." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (citation omitted). The privilege "rests on the need for the advo-

cate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel* v. *United States*, 445 U.S. 40, 51 (1980).

A "waiver," this Court has said many times, is "the intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). *Accord United States* v. *Olano*, 113 S. Ct. 1770, 1777 (1993); *Black's Law Dictionary* 1580 (6th ed. 1990); *see also* R. Bowers, *Law of Waiver* 19 (1914) ("Waiver is the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefit"). Accordingly, where an attorney inadvertently discloses a privileged communication to a third party, and does so without the knowledge or consent of the client, there has by definition been no "waiver" of the privilege. "We are taught from first year law school that waiver imports the 'intentional relinquishment or abandonment of a known right.' Inadvertent production is the antithesis of that concept." *Mendenhall* v. *Barber-Greene Co.*, 531 F. Supp. at 955 (footnote omitted; quoting *Zerbst*).

It is appropriate to apply the *Zerbst* standard in this context because the attorney-client privilege is no ordinary privilege but rather "has traditionally been viewed as sacred and inviolable." Harding, 42 Cath. U. L. Rev. at 482 n.84. As this Court observed in *Upjohn*, the attorney-client privilege is the oldest of its kind known to the common law and advances important public goals linked to the administration of justice. More importantly than that, respecting the confidentiality of attorney-client communications is necessary to effectuate the constitutional right to retain counsel, a right that obtains in criminal and civil cases.[9] "Without the attorney-client privi-

[9] As this Court has recognized, civil litigants have a right to retain counsel by virtue of the Fifth and Fourteenth Amendments. *See Powell* v. *Alabama*, 287 U.S. 45, 69 (1932) (it "may not be

lege," that right "would in large part be rendered meaningless." *United States* v. *Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).[10] In sum, the attorney-client privilege, like other fundamental rights, should only be deemed waived if it has been intentionally relinquished.[11]

A waiver of the privilege cannot be grounded upon the theory that an attorney has implied authority to waive the privilege on behalf of his client. As this Court noted long ago, "the privilege is that of the client alone." *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). *See also CFTC* v. *Weintraub*, 471 U.S. 343, 348 (1985) ("the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors"). There can therefore be no waiver of the privilege where, as here, the

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doubted" that "to refuse to hear a party by counsel" would violate due process "in any case, civil or criminal"); *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970) (welfare benefits recipient "must be allowed to retain an attorney if he so desires" to represent him in a benefits termination hearing); *Maness* v. *Meyers*, 419 U.S. 449, 471 (1975) (Stewart, J., concurring in the result) ("the Court [in *Powell*] recognized a due process right to retained counsel in civil proceedings"); *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 438 (1985) (referring to the "right of counsel of choice in civil cases").

[10] Indeed, some have expressed the view that the privilege is itself a right of constitutional dimension. *See Maness* v. *Meyers*, 419 U.S. at 472 (Stewart, J., concurring in the result) (referring in a civil case to "the constitutionally protected attorney-client relationship"); *Bradt* v. *Smith*, 634 F.2d 796, 800 n.4 (5th Cir.) (the privilege "assume[s] constitutional significance" in some cases), *cert. denied*, 454 U.S. 830 (1981); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 Harv. L. Rev. 464, 485-486 (1977) (arguing that the privilege is constitutionally required in criminal cases).

[11] *See also* Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 Creighton L. Rev. 513, 514 (1990) (arguing that "[a]n economic analysis shows that there is no reason for departing from the traditional requirement that a waiver be knowing and voluntary").

client had no knowledge of and did not consent to his attorney's disclosure of the privileged materials. *See* ABA Section on Litigation, The Attorney-Client Privilege and the Work-Product Doctrine 66 (2d ed. 1989). As is the case with other fundamental rights, an attorney cannot "waive the privilege without his client's consent to the waiver." *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967); *cf. Brookhart* v. *Janis*, 384 U.S. 1 (1966) (defense counsel cannot waive the defendant's right to confront and cross-examine adverse witnesses without the defendant's consent).

The approach of the D.C. and First Circuits (and the Tenth and Federal Circuits in dicta)—dismissing the inadvertence of a disclosure as irrelevant—is contrary to this Court's teachings on the nature of the privilege and the prerequisites to its waiver. The middle approach embraced by the Fifth Circuit—a multi-factor balancing test—has all of these flaws plus the additional one of uncertainty. A privilege can only serve its purpose if it is clear and certain in application. As this Court has explained, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. Here, as was the case in *Upjohn*, "[t]he very terms of the test adopted by the court below suggest the unpredictability of its application." *Id.* Just last Term this Court rejected a proposed multi-factor test, declining to abandon relative certainty "for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1055 (1995). Those same consequences would inevitably accompany adoption of the five-factor balancing test embraced below. *See Berg Electronics*, 875 F. Supp. at 262-263.

The rule applied in the Eighth and Ninth Circuits and advocated by petitioners best serves the purposes of the attorney-client privilege. The core purpose of the privilege

is to foster open and honest communication between attorneys and their clients. *See Upjohn*, 449 U.S. at 389; *CFTC* v. *Weintraub*, 471 U.S. at 348. In addition, by encouraging candor, the privilege helps ensure that individuals will be better informed about the requirements of the law and thus more likely to engage in law-abiding behavior. *Id.* These goals, however, are sorely undermined by a rule that grounds a waiver of the privilege on mere inadvertent disclosures. Clients who are fearful that their confidences might slip through their attorneys' fingers might well choose not to say anything at all. *See Berg Electronics*, 875 F. Supp. at 263 (petitioners' rule "best serves the interests of the attorney-client privilege, as it protects the client from the apprehension that consultations with their legal advisors will be inadvertently disclosed and applies the privilege in a way that is predictable and certain").

Finally, the realities of modern litigation strongly favor the rule that an inadvertent disclosure of privileged materials does not waive the privilege. The rise of liberal discovery rules and technologies that have made it easy to copy and share documents—such as the photocopier, fax machine, and e-mail—have combined to make it all but impossible for even the most diligent counsel to assure that no privileged material passes to the opposition in the course of a substantial document production. As one commentator has observed:

> Given the scope of modern discovery and the realities of contemporary litigation, a question of great practical importance today is whether a voluntary but inadvertent disclosure should result in a waiver. In earlier times, the burden of avoiding such a disclosure of privileged [documents], and the consequent waiver of the privilege, was relatively slight compared to that encountered today where enormous quantities of documents may be sought by an opponent through discovery. Under current conditions, some privileged material is likely to pass through

> even the most tightly woven screen. [1 McCormick, *Evidence* § 93, at 342 (4th ed. 1992) (footnotes omitted).[12]]

The ease with which a privileged document can be inadvertently produced has even been recognized by the American Bar Association, and that recognition has influenced its pronouncements upon the ethical obligations of the bar. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994) (slip op. 2) ("in this advanced technological age with its frequent use of facsimile machines and electronic mail, * * * inadvertent disclosures frequently occur"); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992) (slip op. 1) ("the burgeoning of multiparty cases, the availability of xerography and the proliferation of facsimile machines and electronic mail make it technologically ever more likely that through inadvertence, privileged or confidential materials will be produced to opposing counsel by no more than the pushing of the wrong speed dial number on a facsimile machine").[13]

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[12] *See also Manufacturers & Traders Trust Co.* v. *Servotronics*, 522 N.Y.S.2d 999, 1003 (App. Div. 1987) (commenting upon "the prevalence of corporate litigation involving voluminous discovery material and the inevitability that some privileged documents will be released"); Davidson & Voth, *Waiver of the Attorney-Client Privilege*, 64 Or. L. Rev. 637, 653 (1986) ("In a big case, * * * some inadvertent production is almost inevitable"); Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 Mich. L. Rev. 598, 599 (1983) ("The problem of inadvertent disclosure * * * has become increasingly common as litigation and document productions grow in size") (footnotes omitted); Harding, 42 Cath. U. L. Rev. at 465-466 ("The inadvertent production of documents protected by the attorney-client privilege frequently occurs in contemporary litigation") (footnotes omitted).

[13] The ABA concluded in Opinion No. 368 that a lawyer who receives through inadvertence materials that on their face appear to be subject to the attorney-client privilege is ethically required to refrain from examining the materials. In Opinion No. 382, the ABA similarly determined that a lawyer must refrain from exam-

Thus, although the notion that a party must jealously guard "the confidentiality of attorney-client communications like jewels—if not crown jewels," *Sealed Case*, 877 F.2d at 980, is a romantic one, it simply does not comport with the realities of modern day litigation.[14] In this regard, it is significant and noteworthy that those federal jurisdictions in which a large number of document-intensive corporate and securities cases are litigated follow the rule that petitioners advocate. *See Strategem Development Corp.* v. *Heron Int'l*, 153 F.R.D. at 543-544 & n.12 (S.D.N.Y.); *Connecticut Mut. Life Ins. Co.* v. *Shields*, 18 F.R.D. at 451 (S.D.N.Y.); *Berg Electronics* v. *Molex*, 875 F. Supp. at 263 (D. Del.); *Helman* v. *Murry's Steaks*, 728 F. Supp. at 1104 (D. Del.); *In re Sealed Case*, 120 F.R.D. 66, 72 (N.D. Ill. 1988); *Mendenhall* v. *Barber-Greene Co.*, 531 F. Supp. at 954-955 (N.D. Ill.). The rule applied by these courts, which grapple most frequently with the problem of inadvertent disclosure, is the correct rule.[15]

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ining privileged materials that he has received on an unauthorized basis. If ethical considerations forbid an attorney from making use of privileged materials which were inadvertently disclosed or disclosed without authorization, it would seem that such disclosures should not be deemed to waive the privilege.

[14] No litigant is immune from these difficulties. In *Carter* v. *Gibbs*, 909 F.2d at 1451, the United States sought to claim the privilege with respect to a document it had inadvertently disclosed. The United States argued that the privilege had not been waived because the disclosure was inadvertent, a fact the Federal Circuit dismissed in dicta as "irrelevant". *Id.*

[15] A number of state courts have recently adopted the rule that no waiver results from an inadvertent disclosure. *See, e.g., Trilogy Communications, Inc.* v. *Excom Realty, Inc.*, 652 A.2d 1273, 1274-76 (N.J. Super. Ct. Law Div. 1994); *Kusch* v. *Ballard*, 645 So.2d 1035, 1037-40 (Fla. Dist. Ct. App. 1994) (Stevenson, J., concurring in part and dissenting in part); *id.* at 1035 (Glickstein, J., concurring specially) (agreeing with Judge Stevenson); *6340 Transit Road, Inc.* v. *Unigard Sec. Ins. Co.*, 619 N.Y.S.2d 1015, 1015 (N.Y. App. Div. 1994); *Jenkins* v. *State of Indiana*, 627 N.E.2d 789, 798

The rule that inadvertent disclosure does not waive the privilege not only advances the policies of the attorney-client privilege but also the policies underlying the discovery rules of the Federal Rules of Civil Procedure. Those Rules, particularly as amended in 1993, contemplate an expeditious discovery regime with a minimum of litigation and judicial involvement. *See* Notes of Advisory Committee on 1993 Amendments to Rule 26 ("A major purpose of this revision is to accelerate the exchange of basic information"); Notes of Advisory Committee on 1970 Amendments to Rule 26 ("changes in the mechanics of discovery [were] designed to encourage extrajudicial discovery with a minimum of court intervention"). In the absence of a rule protecting privileged materials in the event of inadvertent disclosure or at least restricting any waiver to documents actually disclosed, parties can be expected generally to be more guarded in their responses to discovery requests. This, in turn, will embroil the courts in the business of refereeing discovery battles with increased frequency. *See Trilogy Communications, Inc.* v. *Excom Realty, Inc.*, 652 A.2d at 1277 (holding that inadvertent disclosure does not waive the privilege

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(Ind. 1993) (work product privilege), *cert. denied*, 115 S. Ct. 64 (1994); *PacifiCorp* v. *Department of Revenue*, 838 P.2d 914, 919-920 (Mont. 1992); *Pitard* v. *Stillwater Transfer & Storage Co.*, 589 So.2d 1127, 1128-29 (La. Ct. App. 1991), *writ denied*, 594 So.2d 1314 (La. 1992); *Barnes/Science Assocs. Ltd. Part.* v. *Barnes Eng'g Co.*, No. CV89 02 77 64S, 1990 WL 283936 (Conn. Super. Ct. June 7, 1990); *Sterling* v. *Keidan*, 412 N.W.2d 255, 258 (Mich. Ct. App. 1987); *see also KL Group* v. *Case, Kay & Lynch*, 829 F.2d 909, 918-919 (9th Cir. 1987) (applying California and Hawaii law); *Shriver* v. *Baskin-Robbins Ice Cream Co.*, 145 F.R.D. 112, 115-116 (D. Colo. 1992) (applying Colorado law).

Federal Rule of Evidence 501 specifies that privilege questions "shall be governed by the principles of the common law," and this clear trend is highly pertinent in assessing those principles. *See, e.g., Trammel* v. *United States*, 445 U.S. at 49 (selection of a rule governing the privilege against adverse spousal testimony in federal courts influenced by "[t]he trend in state law toward" adopting the rule).

because "[t]o hold otherwise would ignore the realities of modern litigation; the need to resolve matters quickly and inexpensively; time requirements of the court rules for the production of documents and discovery strictly enforced by case management orders and other techniques; and the volume of documents often required to be produced in complex litigation").

Because an inadvertent disclosure of privileged materials does not waive the privilege with respect to those materials, it follows *a fortiori* that such a disclosure does not waive the privilege with respect to any other, undisclosed materials. But even if an inadvertent disclosure were considered to result in a waiver of some magnitude, that waiver ought to be limited to the materials actually disclosed.

The general rule is that the *voluntary* revelation of a privileged communication results in a "subject matter waiver"—*i.e.*, a waiver of the privilege with respect to all other communications on the same subject. *See Hunt* v. *Blackburn*, 128 U.S. at 470-471; *United States* v. *Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (per curiam); 1 McCormick, *supra*, § 93, at 343. The rule is designed to prevent parties from selectively disclosing privileged information in order thereby to obtain an advantage. *See In re Von Bulow*, 828 F.2d 94, 101-102 (2d Cir. 1987); Davidson & Voth, 64 Or. L. Rev. at 639-640, 651.

This concern is, however, entirely absent in the context of an inadvertent disclosure. Because an inadvertent disclosure is by definition unintentional, there is no risk that the disclosure was a strategic ploy. Thus, a number of courts have correctly reasoned that "[t]he general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure."

Parkway Gallery, 116 F.R.D. at 52; *see also, e.g., Martin* v. *Valley Nat'l Bank of Arizona, supra* at *4; *FDIC* v. *Marine Midland Realty Credit Corp.*, 138 F.R.D. at 484; *Golden Valley Microwave Foods*, 132 F.R.D. at 208; *Standard Chartered Bank PLC* v. *Ayala Int'l Holdings (U.S.) Inc.*, 111 F.R.D. at 85.

Commentators, too, have sharply criticized the application of the subject matter waiver rule to inadvertent disclosures. *See* Davidson & Voth, 64 Or. L. Rev. at 650 ('Perhaps the most malignant and ill-considered doctrine concerning waiver of privilege is the rule that disclosing one privileged communication—however inadvertently—constitutes a waiver of all privileged communications on the same subject matter"); *Developments in the Law*, 98 Harv. L. Rev. at 1664 (arguing that a "waiver of undisclosed matter is never appropriate to an inadvertent disclosure"); Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1636 (1986).

Other courts, however—like the courts below—have applied the subject matter waiver rule in the case of inadvertent disclosures. *See, e.g., Texaco Puerto Rico, Inc., supra*, at *15; *Sealed Case*, 877 F.2d at 981; *Santrade, LTD*, 150 F.R.D. at 544. The conflict is stark. *Contrast, e.g., Sealed Case*, 877 F.2d at 980-981 (applying in case of waiver by inadvertent disclosure of one document rule that waiver extends "to all other communications relating to the same subject matter") (quotation omitted) *with Golden Valley*, 132 F.R.D. at 208 ("The general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure") (quotation omitted). This Court should grant the petition to resolve the conflict.

III. THE COURT SHOULD TAKE THIS OPPORTUNITY TO RESOLVE THIS IMPORTANT AND PERSISTENT QUESTION

The question presented in this case is an important one worthy of this Court's attention. Given technological developments and the rise of large-scale, multi-party litigation, inadvertent disclosure is an increasingly common phenomenon in discovery, and the question whether an inadvertent disclosure waives the attorney-client privilege is thus, as one leading commentator has remarked, "a question of great practical importance today." 1 McCormick, *supra,* § 93, at 342. Furthermore, it is "[o]ne of the most vigorously-debated evidentiary issues in federal courts and in the periodical literature of litigation." Hundley, *"Inadvertent Waiver" of Evidentiary Privileges,* 19 S. Ill. U. L.J. 263, 263 (1995). Indeed, as noted previously, there is a three-way conflict among the Courts of Appeals on this issue. *Compare Sealed Case* (D.C. Cir.) (inadvertent disclosure waives the privilege) and *Texaco Puerto Rico, Inc.* (1st Cir.) (same) *with Alldread* (5th Cir.) (inadvertent disclosure may or may not waive the privilege) *with Zolin* (9th Cir.) (inadvertent disclosure does not waive the privilege), *John Morrell & Co.* (8th Cir.) (same), *and Ankeny* (C.M.A.) (same). The District Courts are also deeply divided along these lines.

The resolution of this conflict will not benefit from further percolation in the lower courts. This is not a new division among the lower courts; it is a sharp and entrenched conflict, one repeatedly noted by the courts themselves and commentators. The merits of the various positions have been fully aired in the numerous opinions on the issue; what is needed is not further debate but a definitive resolution so that the privilege does not mean one thing in the District of Columbia and First Circuits, another in the Eighth and Ninth, and yet another in the Third and Fifth. Only this Court can provide that resolution.

This Court should resolve these hotly-contested issues in this case. There is no question but that the documents in this case were, as the District Court recognized, "inadvertently disclosed." App. 18a. There is also no dispute before this Court that the disclosed documents were privileged. *See id.* at 18a-19a; *supra* 4-5 & n.4. There are no other factual issues that need to be resolved before confronting the legal questions that have so sharply divided the lower courts. Furthermore, it is clear that both the District Court and the Court of Appeals directly ruled upon the issue. The District Court adopted the view that an inadvertent disclosure can sometimes waive the privilege and the Court of Appeals considered, and rejected, the contention that the District Court "erred in finding that petitioners had waived their attorney-client privilege with regard to communications with their counsel concerning their rights and liabilities with regard to transfers of their assets." App. 5a. Thus, the issues upon which the lower federal courts have split are squarely presented in this case.

This case presents an ideal vehicle for the Court to resolve these conflicts, because the issue here concerns whether documents other than those inadvertently disclosed lose their privileged status by virtue of the inadvertent disclosure. The facts in this case thus afford the Court the opportunity to consider not only whether inadvertent disclosure can result in a waiver of the privilege, but also whether such waiver—if there is any—can extend beyond the documents which were actually disclosed. If the Court were to grant certiorari in a case in which the discovery dispute was over the disclosed documents themselves, it would necessarily have to await another case to decide the scope of any waiver. This case would allow the Court to address both issues and fully answer the questions that have divided the lower courts.

The fact that the legal issues were presented to the Third Circuit on a petition for mandamus is no impedi-

ment to this Court's review. *See, e.g., Mallard* v. *United States District Court,* 490 U.S. 296 (1989) (reviewing court of appeals order denying mandamus to resolve conflict among the Circuits). Because a trial court order requiring the production of documents is interlocutory and hence not immediately appealable, appellate review of such orders often occurs by way of mandamus.

In his separate opinion in *Upjohn,* Chief Justice Burger noted:

> [B]ecause Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," this Court has a special duty to clarify aspects of the law of privileges properly before us. [449 U.S. at 403-404 (concurring in part and in the judgment).]

The lower federal courts are in disarray as to the consequences of an inadvertent disclosure of privileged documents: they apply three very different approaches to determine whether such disclosure leads to a waiver of the privilege, and two very different rules to determine the scope of any waiver. This Court's "special duty to clarify aspects of the law of privileges" is plainly implicated in this case. The Court should grant certiorari to resolve the conflict in the lower courts on these important and recurring questions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 95-7023

KEYSTONE SANITATION COMPANY, INC., KENNETH F. NOEL and ANNA M. NOEL

v.

ARCATA GRAPHICS FAIRFIELD, INC., C & J CLARK, AMERICA, INC., THE ESAB GROUP, INC., THE GENLYTE GROUP, INC., HANOVER BRONZE AND ALUMINUM FOUNDRY, INC., KEMPER INDUSTRIES, INC., R. H. SHEPPARD, INC. AND SKF USA INC., ADVANCED DISPOSAL SERVICE, AERO OIL COMPANY, AGRICULTURAL COMMODITIES, INC., D/B/A OR F/D/B/A AGCOM, INC., AGWAY PETROLEUM, AMERICAN NATIONAL CAN, AMES DEPARTMENT STORE, AMP INC., ANDGROW FERTILIZER, INC., ARENTZ ROOFING, ARISTOKRAFT, INC., B & B AUTO BODY SHOP, B & K TRUCKING, INC., BAIR WOODEN PRODUCTS, BALTIMORE GAS & ELECTRONIC, BAUM & HERSH ASSOCIATION, INC., BEELER BOX COMPANY, D/B/A OR F/D/B/A BEELER MANUFACTURING, BERMUDIAN SPRINGS SCHOOL DISTRICT, BETHENERGY MINES CORPORATION, FORMERLY OPERATING AS BETHLEHEM MINES CORPORATION, BIBB CO., INC., D/B/A OR F/D/B/A MALCOLM SPINNING CO., BIGLERVILLE SCHOOLS UPPER ADAMS COUNTY SCHOOL DISTRICT, BLACK'S SUNOCO, INC., BLUE BIRD FABRIC CORPORATION, BON-TON FOODS, INC., BIGLERVILLE BOROUGH BONNEAUVILLE BOROUGH, DILLSBURG BOROUGH, BOROUGH OF EAST BERLIN, BOROUGH OF GETTYSBURG,

HANOVER BOROUGH, BOROUGH OF LEMOYNE, LITTLESTOWN BOROUGH, BOROUGH OF NEW OXFORD, BOROUGH OF YORK SPRINGS, BREAMS PRINT SHOP, BROOKS SHOW COMPANY, CADBURY BEVERAGES, INC., SUCCESSOR TO AND FORMERLY DOING BUSINESS AS DUFFY MOTT COMPANY, INC., CAMBRIDGE RUBBER COMPANY, CAPITAL PRODUCTS, ALSO OR FORMERLY KNOWN AS ETHYL CORP., CLYDE A. WENSCHHOF, JR., COLDSMITH ROOFING, COLONIAL SHOE COMPANY, COLONIAL FIBERGLASS, COLUMBIA GAS TRANSMISSION COMPANY, CONEWAGO CONTRACTORS, INC., CONEWAGO TOWNSHIP, CONTINENTAL WIRE & CABLE, ALSO OR FORMERLY KNOWN AS ANACONDA-ERICSON, COULSEN HEEL COMPANY, CRAMER ZEIGLER TIRE COMPANY, CSX, TRANSPORTATION, FORMERLY KNOWN AS, AND SUCCESSOR TO, WESTERN MARYLAND RAILWAY COMPANY, D.K. HERSHEY, DAL-TILE CORPORATION, DEL-WOOD KITCHENS, DER-TEXT OF PENNSYLVANIA, DONALD B. SMITH, DOUBLEDAY BOOK & MUSIC CLUB, INC., DUPLEX PRODUCTS, INC., EARL BARNHART CONTRACTORS, EASTERN WASTE INDUSTRIES, EDDIE'S CLEANERS, EICHOLTZ CO., EISENHART WALLCOVERINGS COMPANY, EMECO INDUSTRIES, INC., F & W BLACKTOPPING, FOSTER STONESEIFER SANITATION, FREEMAN SHOE COMPANY, GAM PRINTING, GERLACH INSULATION, GERMANTOWN REFUSE, GERMANY TOWNSHIP, GETTYSBURG COLLEGE, GETTYSBURG HOSPITAL, GETTYSBURG TRANSFORMER, THE GETTYSBURG TIMES, GETTYSBURG MUNICIPAL AUTHORITY, GETTYSBURG AREA SCHOOL DISTRICT, GIANT FOODS, GOBRECHT TRASH REMOVAL, INC., GOODYEAR TIRE CENTER, GROVER HANSFORD, GUILDCRAFT, INC., D/B/A GUILDCRAFT FURNITURE & BEDDING, HANOVER BRANDS, HANOVER DIRECT INC., HANOVER GENERAL HOSPITAL, HANOVER INDUSTRIAL MACHINE, HANOVER INDUSTRIES, HANOVER KLONDIKE, HANOVER PEN, HANOVER POTATO PRODUCTS, INC., HANOVER TRANSFER COMPANY, HANOVER WIRE CLOTH, HBH CONTRACTORS, INC., HEIDELBURG TOWNSHIP,

HENSON PAVING COMPANY, INC., HERFF JONES YEARBOOKS, HILL'S STORES, D/B/A OR F/D/B/A HILLS DEPARTMENT STORES, INC., H.M. KELLEY, INC. TRUCKING, HOFFHEINS BROTHERS, HOSTETTER CONSTRUCTION CORPORATION, INLAND CONTAINER, JAMESWAY CORPORATION, J.A. MYERS BUILDING AND DEVELOPMENT, INC., J.F. ROHBRAUGH & COMPANY, INC. JOHN JACOBS, K-MART CORP., KNOUSE FOODS COOPERATIVE, L.M. KLUNK & SONS, LEINHARDT BROTHERS FURNITURE, LIONEL KIDDIE CITY, LITTLESTOWN LAUNDRY, LITTLESTOWN PATTERN WORKS, LITTLESTOWN HARDWARE & FOUNDRY, LOWE'S HOME CENTERS, INC., MASTER ROOFERS, INC., MCCLARIN PLASTICS, MCSHERRYSTOWN BOROUGH OFFICE, MENELLAN TOWNSHIP, METROPOLITAN EDISON, MILLER CHEMICAL AND FERTILIZER CORP., MOBIL OIL CORP., D/B/A OR F/D/B/A ELECTRO-PHOSPHORUS CO., MONTGOMERY COUNTY SANITATION FOR ITSELF AND AS SUCCESSOR TO LAKE FOREST EAST REFUSE COMPANY AND GERMANTOWN REFUSE CORPORATION, MONTGOMERY VILLAGE REFUSE, INC., MORTON BUILDING PLANT, MOUNT PLEASANT TOWNSHIP, NEIDERER SANITATION, NELL'S, INC., NEVIN L. BARNHART CONTRACTORS, NEW OXFORD MUNICIPAL AUTHORITY, OXFORD TOWNSHIP MUNICIPAL BUILDING, OXFORD CONTAINER COMPANY, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, BUREAU OF STATE PARKS, COCORUS STATE PARK, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF MILITARY AFFAIRS, PARADISE TOWNSHIP, PENN AUTO BODY SHOP, PENN TOWNSHIP, PENN TOWNSHIP WASTE WATER TREATMENT PLANT, PENN-MARR CASTINGS, RAY MAR ROOFING, REFUSE REMOVAL SERVICE, RENTAL UNIFORM SERVICE, ROBERT A. KINSLEY, INC., ROUND HILL FOODS, INC., SCHINDLER CORP., SCHMUCKS, SCHUCHART OIL AND PROPANE SEALED AIR CORPORATION, ALSO OR

FORMERLY KNOWN AS JIFFY PACKAGING COMPANY, SENECA VALLEY REFUSE, SHEPHERD ALUMINUM PRODUCTS, SHERIDAN PRESS, SKETCHLEY SERVICES, INC. ALSO OR FORMERLY KNOWN AS COYNE AND/OR RENTEX CORPORATION, SKI LIBERTY, SNYDER'S OF HANOVER, INC., FORMERLY KNOWN AS HANOVER GUEST QUALITY, INC., SONOCO PRODUCTS COMPANY, SPECTRAKOTE CORPORATION, SUPERIOR PLATING, SYLVANIA SHOE, THE LUMBER YARD, THOMAS B. LAWYER, 3-D MANUFACTURING, TITUS TRASH REMOVAL, TRIMEN INDUSTRIES, INC., UNION TOWNSHIP UNITED DISPOSAL CORPORATION, U.S. SHOE CORP., SUCCESSOR TO AND F/B/D/A FREEMAN SHOE COMPANY, UTZ POTATO CHIP COMPANY, VILLAGE DISPOSAL, INC., WASTE MANAGEMENT OF PENNSYLVANIA WILDASON ROOFING & REMODELING, CITY OF YORK, YORK WASTE DISPOSAL, INC., YORK GRAPHIC SERVICES, INC., and the UNITED STATES OF AMERICA,

THE HONORABLE SYLVIA H. RAMBO,
Nominal Respondent

KEYSTONE SANITATION COMPANY, INC. ("KEYSTONE");
KENNETH F. NOEL; ANNA M. NOEL,
Petitioners

Expedited Petition For Writ of Mandamus
United States District Court for the
Middle District of Pennsylvania
(D.C. Civ. No. 93-1482)
District Judge: Honorable Sylvia H. Rambo

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 5, 1995

Before: MANSMANN, SCIRICA and McKEE
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by the petitioners, to wit, that the court erred in finding that petitioners had waived their attorney-client privilege with regard to communications with their counsel concerning their rights and liabilities with regard to transfers of their assets, it is

ADJUDGED AND ORDERED that the petition for Writ of Mandamus is hereby denied.

By the Court,

/s/ [Illegible]
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. DOUGLAS SISK

[May 12, 1995]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 95-7023

KEYSTONE SANITATION COMPANY, INC., KENNETH F. NOEL and ANNA M. NOEL

v.

ARCATA GRAPHICS FAIRFIELD, INC., C & J CLARK, AMERICA, INC., THE ESAB GROUP, INC., THE GENLYTE GROUP, INC., HANOVER BRONZE AND ALUMINUM FOUNDRY, INC., KEMPER INDUSTRIES, INC., R. H. SHEPPARD, INC. AND SKF USA INC., ADVANCED DISPOSAL SERVICE, AERO OIL COMPANY, AGRICULTURAL COMMODITIES, INC., D/B/A OR F/D/B/A AGCOM, INC., AGWAY PETROLEUM, AMERICAN NATIONAL CAN, AMES DEPARTMENT STORE, AMP INC., ANDGROW FERTILIZER, INC., ARENTZ ROOFING, ARISTOKRAFT, INC., B & B AUTO BODY SHOP, B & K TRUCKING, INC., BAIR WOODEN PRODUCTS, BALTIMORE GAS & ELECTRONIC, BAUM & HERSH ASSOCIATION, INC., BEELER BOX COMPANY, D/B/A OR F/D/B/A BEELER MANUFACTURING, BERMUDIAN SPRINGS SCHOOL DISTRICT, BETHENERGY MINES CORPORATION, FORMERLY OPERATING AS BETHLEHEM MINES CORPORATION, BIBB CO., INC., D/B/A OR F/D/B/A MALCOLM SPINNING CO., BIGLERVILLE SCHOOLS UPPER ADAMS COUNTY SCHOOL DISTRICT, BLACK'S SUNOCO, INC., BLUE BIRD FABRIC CORPORATION, BON-TON FOODS, INC., BIGLERVILLE BOROUGH BONNEAUVILLE BOROUGH, DILLSBURG BOROUGH, BOROUGH OF EAST BERLIN, BOROUGH OF GETTYSBURG,

HANOVER BOROUGH, BOROUGH OF LEMOYNE, LITTLESTOWN BOROUGH, BOROUGH OF NEW OXFORD, BOROUGH OF YORK SPRINGS, BREAMS PRINT SHOP, BROOKS SHOW COMPANY, CADBURY BEVERAGES, INC., SUCCESSOR TO AND FORMERLY DOING BUSINESS AS DUFFY MOTT COMPANY, INC., CAMBRIDGE RUBBER COMPANY, CAPITAL PRODUCTS, ALSO OR FORMERLY KNOWN AS ETHYL CORP., CLYDE A. WENSCHHOF, JR., COLDSMITH ROOFING, COLONIAL SHOE COMPANY, COLONIAL FIBERGLASS, COLUMBIA GAS TRANSMISSION COMPANY, CONEWAGO CONTRACTORS, INC., CONEWAGO TOWNSHIP, CONTINENTAL WIRE & CABLE, ALSO OR FORMERLY KNOWN AS ANACONDA-ERICSON, COULSEN HEEL COMPANY, CRAMER ZEIGLER TIRE COMPANY, CSX, TRANSPORTATION, FORMERLY KNOWN AS, AND SUCCESSOR TO, WESTERN MARYLAND RAILWAY COMPANY, D.K. HERSHEY, DAL-TILE CORPORATION, DEL-WOOD KITCHENS, DER-TEXT OF PENNSYLVANIA, DONALD B. SMITH, DOUBLEDAY BOOK & MUSIC CLUB, INC., DUPLEX PRODUCTS, INC., EARL BARNHART CONTRACTORS, EASTERN WASTE INDUSTRIES, EDDIE'S CLEANERS, EICHOLTZ CO., EISENHART WALLCOVERINGS COMPANY, EMECO INDUSTRIES, INC., F & W BLACKTOPPING, FOSTER STONESEIFER SANITATION, FREEMAN SHOE COMPANY, GAM PRINTING, GERLACH INSULATION, GERMANTOWN REFUSE, GERMANY TOWNSHIP, GETTYSBURG COLLEGE, GETTYSBURG HOSPITAL, GETTYSBURG TRANSFORMER, THE GETTYSBURG TIMES, GETTYSBURG MUNICIPAL AUTHORITY, GETTYSBURG AREA SCHOOL DISTRICT, GIANT FOODS, GOBRECHT TRASH REMOVAL, INC., GOODYEAR TIRE CENTER, GROVER HANSFORD, GUILDCRAFT, INC., D/B/A GUILDCRAFT FURNITURE & BEDDING, HANOVER BRANDS, HANOVER DIRECT INC., HANOVER GENERAL HOSPITAL, HANOVER INDUSTRIAL MACHINE, HANOVER INDUSTRIES, HANOVER KLONDIKE, HANOVER PEN, HANOVER POTATO PRODUCTS, INC., HANOVER TRANSFER COMPANY, HANOVER WIRE CLOTH, HBH CONTRACTORS, INC., HEIDELBURG TOWNSHIP,

HENSON PAVING COMPANY, INC., HERFF JONES YEARBOOKS, HILL'S STORES, D/B/A OR F/D/B/A HILLS DEPARTMENT STORES, INC., H.M. KELLEY, INC. TRUCKING, HOFFHEINS BROTHERS, HOSTETTER CONSTRUCTION CORPORATION, INLAND CONTAINER, JAMESWAY CORPORATION, J.A. MYERS BUILDING AND DEVELOPMENT, INC., J.F. ROHBRAUGH & COMPANY, INC. JOHN JACOBS, K-MART CORP., KNOUSE FOODS COOPERATIVE, L.M. KLUNK & SONS, LEINHARDT BROTHERS FURNITURE, LIONEL KIDDIE CITY, LITTLESTOWN LAUNDRY, LITTLESTOWN PATTERN WORKS, LITTLESTOWN HARDWARE & FOUNDRY, LOWE'S HOME CENTERS, INC., MASTER ROOFERS, INC., MCCLARIN PLASTICS, MCSHERRYSTOWN BOROUGH OFFICE, MENELLAN TOWNSHIP, METROPOLITAN EDISON, MILLER CHEMICAL AND FERTILIZER CORP., MOBIL OIL CORP., D/B/A OR F/D/B/A ELECTRO-PHOSPHORUS CO., MONTGOMERY COUNTY SANITATION FOR ITSELF AND AS SUCCESSOR TO LAKE FOREST EAST REFUSE COMPANY AND GERMANTOWN REFUSE CORPORATION, MONTGOMERY VILLAGE REFUSE, INC., MORTON BUILDING PLANT, MOUNT PLEASANT TOWNSHIP, NEIDERER SANITATION, NELL'S, INC., NEVIN L. BARNHART CONTRACTORS, NEW OXFORD MUNICIPAL AUTHORITY, OXFORD TOWNSHIP MUNICIPAL BUILDING, OXFORD CONTAINER COMPANY, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, BUREAU OF STATE PARKS, COCORUS STATE PARK, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF MILITARY AFFAIRS, PARADISE TOWNSHIP, PENN AUTO BODY SHOP, PENN TOWNSHIP, PENN TOWNSHIP WASTE WATER TREATMENT PLANT, PENN-MARR CASTINGS, RAY MAR ROOFING, REFUSE REMOVAL SERVICE, RENTAL UNIFORM SERVICE, ROBERT A. KINSLEY, INC., ROUND HILL FOODS, INC., SCHINDLER CORP., SCHMUCKS, SCHUCHART OIL AND PROPANE SEALED AIR CORPORATION, ALSO OR

FORMERLY KNOWN AS JIFFY PACKAGING COMPANY, SENECA VALLEY REFUSE, SHEPHERD ALUMINUM PRODUCTS, SHERIDAN PRESS, SKETCHLEY SERVICES, INC. ALSO OR FORMERLY KNOWN AS COYNE AND/OR RENTEX CORPORATION, SKI LIBERTY, SNYDER'S OF HANOVER, INC., FORMERLY KNOWN AS HANOVER GUEST QUALITY, INC., SONOCO PRODUCTS COMPANY, SPECTRAKOTE CORPORATION, SUPERIOR PLATING, SYLVANIA SHOE, THE LUMBER YARD, THOMAS B. LAWYER, 3-D MANUFACTURING, TITUS TRASH REMOVAL, TRIMEN INDUSTRIES, INC., UNION TOWNSHIP UNITED DISPOSAL CORPORATION, U.S. SHOE CORP., SUCCESSOR TO AND F/B/D/A FREEMAN SHOE COMPANY, UTZ POTATO CHIP COMPANY, VILLAGE DISPOSAL, INC., WASTE MANAGEMENT OF PENNSYLVANIA WILDASON ROOFING & REMODELING, CITY OF YORK, YORK WASTE DISPOSAL, INC., YORK GRAPHIC SERVICES, INC., and the UNITED STATES OF AMERICA,

THE HONORABLE SYLVIA H. RAMBO,
Nominal Respondent

KEYSTONE SANITATION COMPANY, INC. ("KEYSTONE"); KENNETH F. NOEL; ANNA M. NOEL,
Petitioners

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and SAROKIN *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all

other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]
Circuit Judge

Dated: Jun. 9, 1995

APPENDIX C

[Filed Oct. 19, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 1:CV-93-1482

(Rambo, C.J.)

UNITED STATES OF AMERICA,
Plaintiff

v.

KEYSTONE SANITATION COMPANY, INC.; KENNETH F. NOEL, individually and f/d/b/a KEYSTONE SANITATION COMPANY; ANNA M. NOEL, individually and f/d/b/a KEYSTONE SANITATION COMPANY; ARCATA GRAPHICS FAIRFIELD, INC.; C & J CLARK, AMERICA, INC.; THE ESAB GROUP, INC.; THE GENLYTE GROUP, INC.; HANOVER BRONZE AND ALUMINUM FOUNDRY, INC.; KEMPER INDUSTRIES, INC.; R.H. SHEPPARD COMPANY, INC.; and SKF USA, INC.,
Defendants

v.

ADVANCED DISPOSAL SERVICE, *et al.*,
Third-party Defendants

MEMORANDUM AND ORDER

Introduction

Before the court is correspondence addressed to the court from counsel for Keystone Sanitation Company, Inc., Kenneth F. Noel, and Anna M. Noel (the "Keystone Defendants") and counsel for Arcata Graphics

Fairfield, Inc., regarding a discovery dispute. It is the court's understanding that Arcata is acting in this discovery dispute on behalf of itself and C & J Clark, America, Inc., The Esab Group, Inc., The Genlyte Group, Inc., Hanover Bronze and Aluminum Foundry, Inc., Kemper Industries, Inc., R.H. Sheppard Company, Inc., and SKF USA, Inc. (collectively the "Generator Defendants"). The court will treat the letters as a motion to compel submitted by the Generator Defendants.

The Generator Defendants raised concerns in the past that the Keystone Defendants have been involved in an effort to dispose of their assets in order to avoid paying their share of any liability imposed in this CERCLA litigation. The Generator Defendants requested that the Keystone Defendants produce all documents related to their transfer of assets since the Environmental Protection Agency began its investigation of the Keystone Site in 1990. As part of that production, they requested any attorneys' billing statements that address this area of information, without the redaction of the names of attorneys or the narrative of the legal services provided. The Keystone Defendants argue that the narrative and identities of attorneys in billing statements are protected by the attorney-client and work product privilege. The Generator Defendants respond that the Keystone Defendants waived any privilege by including in a prior document production internal electronic mail printouts from their attorneys showing that attorneys were providing the Keystone Defendants with legal advice as to how to take their assets out of the corporation.

The documents that give rise to the Generator Defendants' claim of waiver were produced in response to the court's August 26, 1994, order, which addressed the Keystone Defendants' refusal to provide information relevant to the disposition of their assets since 1990. The court's order directed each of the Keystone Defendants to respond without further delay to all requests aimed at dis-

covering information about the sale, transfer, or other disposition of their assets since 1990, and about the individual (Noel) Keystone Defendants' financial dealings with Keystone. The order also directed the Keystone Defendants that, should they claim any privilege, they should submit to the Generator Defendants and the court a detailed statement of privilege.

The two documents alleged to have been inadvertently disclosed are electronic mail messages from one attorney servicing the Keystone Defendants to others. One states: "I see out [sic] major goal, apart from defending the environmental liability claims, is to encourage the Noels to take as much out of the corporation as they legitimately can do." Another e-mail contains a message stating that Florida law exempts a principal residence from levy by creditors in an unlimited amount. The court understands the argument to be that since this category of information has been disclosed, to the extent the same category of information is contained in the narrative of billing statements, any privilege has been waived.

Discussion

As a preliminary matter, there is general agreement that attorney billing statements and time records are protected by the attorney-client privilege *only* to the extent that they reveal litigation strategy and/or the nature of services performed. *See, e.g., Gonzalez Crespo v. The Wella Corp.*, 774 F. Supp. 688, 690 (D.P.R. 1991); *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 144 F.R.D. 600, 607 (D. Mass. 1992); *Real v. Continental Group, Inc.*, 116 F.R.D. 211, 213-14 (N.D. Cal. 1986). Thus, statements and records that simply reveal the amount of time spent, the amount billed, and the type of fee arrangement between attorney and client are fully subject to discovery. *Real v. Continental Group, Inc.*, 116 F.R.D. at 214. Here, of course, the Generator Defendants are interested precisely in the narrative and iden-

tities of attorneys and, therefore, the billing statements as they wish them to be produced would be protected by the attorney-client privilege, absent a waiver.[1]

The Keystone Defendants claim that the documents at issue were disclosed inadvertently. Inadvertent disclosure may or may not require a finding of waiver, but it becomes more appropriate when the documents at issue were produced pursuant to Federal Rule of Civil Procedure 34. *See O'Leary v. Purcell Co.*, 108 F.R.D. 641, 646 (M.D.N.C. 1985); *Advanced Med., Inc. v. Arden Med. Sys., Inc.*, Civ. No. 87-3059, 1988 WL 76128 at *2 (E. D. Pa. July 18, 1988). Many courts use the following factors to determine whether a document has lost its privilege through inadvertent disclosure: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measure taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving a party of its error. *Advanced Med., Inc. v. Arden Med. Sys., Inc., supra,* at *2 (collecting cases). The court views this waiver analysis as applying both to attorney-client and work product protection.

Addressing the first prong of the waiver analysis, the court notes that the Keystone Defendants produced the documentation without further contact with the court. Although they now complain that it was and continues to be a massive production, the court set no immediate deadline for completion of that particular production and the Keystone Defendants did not request additional time to review the documents before they began production so that they could devise a statement of privilege. Given

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[1] Lying somewhere between the hours performed and the narrative of services performed is the issue of the names of attorneys performing services. The court will not reach the issue, however, in light of its decision on the waiver issue.

these circumstances, the court finds that the precautions taken were not reasonable.

As to the number and extent of disclosures, although there were only two documents revealing that attorneys were advising the Keystone Defendants on the disposition of assets, the extent of disclosure in these documents is complete. The question the Generator Defendants want to have answered is whether the Keystone Defendants have removed assets to avoid CERCLA liability. They have questioned the purpose of the sale of Keystone's assets to Waste Management, Inc., and the disposition of the proceeds of that sale. They have also questioned the Noel's purchase of a home in Florida. In short, the inadvertently disclosed documents plainly allude to information pertinent to whether attorneys were assisting the Keystone Defendants to execute a calculated removal of assets from the reach of creditors (including the government), and that is precisely the type of information sought from the billing and time statements of the Keystone Defendants' attorneys. Thus, the second and third factors weigh in favor of a finding of waiver.

The court does not find that the fourth factor, the issue of delay or measures taken to rectify the inadvertent disclosure, is significantly implicated in this case. The document production was ordered on August 26, 1994, and the parties appear to have been arguing the waiver question since early September.

The last factor, however, weighs squarely in favor of waiver. As the court indicated in its August 26, 1994, memorandum and order, the primary goal of CERCLA is to ensure that liable parties bear their fair shares of the costs of environmental cleanup. To preclude discovery as to whether principal potentially responsible parties are or were engaged in the deliberate dissipation of assets for the purpose of avoiding a share of liability runs directly counter to that goal. To do so based upon a claim of privilege, when there has been an inadvertent

disclosure of documents suggesting that this is the case, runs counter to the interests of justice.

The balance of these factors weighs in favor of holding that the Keystone Defendants have waived any privilege that may have protected their attorneys' billing statements from disclosure with respect to the narrative of services and identities of attorneys performing services. The court does not mean to say that the Keystone Defendants must produce all attorney billing statements in unredacted form, but only those related to the disposition of assets.

Accordingly, IT IS HEREBY ORDERED THAT:

(1) The Keystone Defendants shall produce all attorney billing statements related to legal services provided with respect to the transfer of assets as defined in paragraph (1) of the court's August 26, 1994, memorandum and order;

(2) The billing statement produced in accordance with paragraph 1, above, shall *not* be redacted to remove the names of attorneys performing services for the Keystone Defendants or the narrative of services performed.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
Chief Judge
Middle District of Pennsylvania

Dated: October 19, 1994.

APPENDIX D

[Filed Jan. 13, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 1:CV-93-1482
(Rambo, C.J.)

UNITED STATES OF AMERICA,
Plaintiff

v.

KEYSTONE SANITATION COMPANY, INC.; KENNETH F. NOEL, individually and f/d/b/a KEYSTONE SANITATION COMPANY; ANNA M. NOEL, individually and f/d/b/a KEYSTONE SANITATION COMPANY; ARCATA GRAPHICS FAIRFIELD, INC.; C & J CLARK, AMERICA, INC.; THE ESAB GROUP, INC.; THE GENLYTE GROUP, INC.; HANOVER BRONZE AND ALUMINUM FOUNDRY, INC.; KEMPER INDUSTRIES, INC.; R.H. SHEPPARD COMPANY, INC.; and SKF USA, INC.,
Defendants

ORDER

This order will dispose of two matters now before the court. The first is the motion of the Keystone Sanitation Company, Kenneth F. Noel, and Anna M. Noel (the "Keystone Defendants") requesting reconsideration of the court's October 19, 1994, memorandum and order directing limited production of the billing memoranda of their attorneys. The focus of the brief filed by the Keystone

Defendants in support of the motion for reconsideration is that the documents produced, upon which the court relied to hold that there had been a limited waiver of the attorney/client privilege, were not privileged in the first place. The court does not agree with the Keystone Defendants' position in this matter. The court's reasoning is set forth in full in its memorandum of October 19, and will not be repeated herein. To the extent that clarification may assist the parties with respect to this issue, the court offers the following.

Attorney billing memoranda are not privileged *per se*. They are privileged, as the parties well understand, *only* to the extent that they reveal litigation strategy and/or the nature of services performed. Thus, it is the actual content of the document, rather than the type of document, that is privileged. It does not matter whether the document was sent to the client, or to, say, an expert witness involved in the representation, or to another attorney in the firm. If it contains information that would reveal litigation strategy or the nature of counsel, it is protected. With this understanding, the court looked at the documents that were inadvertently disclosed, which were not billing memoranda, but were communications between attorneys representing the Keystone Defendants, determined that the Keystone Defendants' had inadvertently disclosed a particular category of information, and held that to the extent the content of the billing memoranda included that category of information, the Keystone Defendants had waived the attorney/client privilege as to that content only.

The Keystone Defendants now assert that the documents that were inadvertently disclosed were not privileged because they were not sent to the client and, therefore, their disclosure to the Generator Defendants cannot operate to waive a privilege as to the narrative portions of the billing memoranda, which are privileged. This argument is untenable. Suppose the Generator De-

fendants had requested all electronic mail messages between the attorneys representing the Keystone Defendants, which contained any reference to the disposition of Keystone assets. It is a virtual certainty that the Keystone Defendants would have refused on the grounds that the documents contained privileged communications regarding advice given to their clients. Thus, their current assertion that the disclosed documents were not privileged in the first place is not well taken.

The court has carefully reviewed its application of the factors pertinent to whether a privilege has been waived on the grounds of inadvertent disclosure. The decision was a difficult one, in the first place, but upon review, the court finds itself constrained to adhere to its prior ruling. The court reiterates that the Generator Defendants are entitled to discover only those portions of the narrative statements of attorney billing memoranda that relate to the disposition of the assets of the Keystone Sanitation Company and the Noels.

While this memorandum was in the drafting process this day, the court received a telephone call from the parties, who were in the process of deposing Anna Noel for the upcoming preliminary injunction hearing. Counsel for the Generator Defendants had posed a question to Anna Noel regarding communications between her and her accountant, which the court understands was to lead to questions concerning the disposition of the assets of Keystone and the Noels. Counsel for the Keystone Defendants raised the accountant/client privilege under Pennsylvania statutory law. The court ruled in the telephone conference that there is no federal accountant/client privilege, and that because this case is before the court on a federal question, the federal common law, and not Pennsylvania's statutory law of privilege applies. Counsel for the Keystone Defendants argued that the privilege in this case has been asserted only with respect to a state law claim (the fraudulent conveyance claim,

which has yet to be filed, and which is the subject of the very recent motion to amend the complaint). The court does not believe, first, that the privilege is asserted only with respect to a state law claim. As the court has previously held, it is authorized to enjoin the disposition of assets in appropriate circumstances in a case brought under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). Second, even if the privilege were asserted only with respect to a pendant state law claim, Pennsylvania's law of privilege would not preempt the federal law or privilege.

The court relies upon the following cases for its decision on this accountant/client privilege question: *United States v. Arthur Young & Co.*, 465 U.S. 805, 817; *Couch v. United States*, 409 U.S. 322, 335 (1973); *Wm. T. Thompson v. General Nutrition Co.*, 671 F.2d 100, 103-04 (3d Cir. 1982). The court also reviewed several recent cases from the district courts of this Circuit. It is apparent from the case law that when a federal and state claim are tried together in federal court, if claim of privilege is raised only in reference to the state claim, the federal law of privilege applies.

In today's conference call, the parties also raised the issue of the questioning of Anna Noel regarding her communications with the Keystone Defendants' attorneys regarding disposition of assets. The court explained in the conference call that it had reached the decision to adhere to its prior ruling on the limited obligation to produce the billing memoranda containing this type of information. In light of that ruling, the court instructed the parties that the attorney/client privilege has also been waived, in the same limited fashion, with respect to the questioning of Anna Noel. In other words, information regarding her attorneys' assistance or advice to her regarding the disposition of Keystone Sanitation Company and personal assets after the onset of the CERCLA in-

vestigation that led to this action is now discoverable. Counsel for the Keystone Defendants advised the court of its intention to seek a Writ of Mandamus with respect to this ruling (and presumably, the order to produce the billing memoranda), and requested the court to stay the ruling. The court will do so.

Accordingly, IT IS HEREBY ORDERED THAT:

(1) The motion of the Keystone Defendants' for reconsideration of the court's October 19, 1994 ruling is DENIED;

(2) The Keystone Defendants may not refuse to answer questions regarding the disposition of Keystone assets and the assets of the Noels based upon attorney/client or accountant/client privilege; and

(3) The court will stay the order *only* with respect to the ruling on the attorney client privilege to afford the Keystone Defendants the opportunity to petition the Third Circuit Court of Appeals for a Writ of Mandamus on this issue.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
Chief Judge
Middle District of Pennsylvania

Dated: January 13, 1995.

Supreme Court, U.S.
FILED
SEP 15 1995
CLERK

No. 95-273

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KEYSTONE SANITATION COMPANY, INC., *et al.*,
Petitioners,

v.

ARCATA GRAPHICS FAIRFIELD, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION OF RESPONDENT QUEBECOR PRINTING FAIRFIELD INC. (FORMERLY KNOWN AS ARCATA GRAPHICS FAIRFIELD, INC.)

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56 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

The District Court found a limited subject-matter waiver of attorney-client privilege based on the production of documents that revealed confidential attorney-client communications about an apparent plan to fraudulently convey assets out of the reach of judgment creditors. A petition for mandamus, asserting that the waiver of privilege should be limited to the documents already disclosed, was filed with the Court of Appeals. Did the Court of Appeals abuse its discretion by denying mandamus relief from the District Court's interlocutory discovery ruling?

RULE 29.1 STATEMENT OF CORPORATE AFFILIATIONS

Respondent Quebecor Printing Fairfield Inc. is a wholly-owned subsidiary of Quebecor Printing Graphics Company, which is a wholly-owned subsidiary of Arcata Corporation, which is a wholly-owned subsidiary of Quebecor Printing (USA) Holdings Inc., which is a wholly-owned subsidiary of Quebecor Printing Inc., which is a publicly-owned Canadian corporation.

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IN THE

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OCTOBER TERM, 1995

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KEYSTONE SANITATION COMPANY, INC., *et al.*,
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v.

ARCATA GRAPHICS FAIRFIELD, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT QUEBECOR PRINTING FAIRFIELD INC. (FORMERLY KNOWN AS ARCATA GRAPHICS FAIRFIELD, INC.)

Respondent Quebecor Printing Fairfield Inc. (formerly known as Arcata Graphics Fairfield, Inc.) respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the judgment of the United States Court of Appeals for the Third Circuit in this case. That judgment, a summary denial of mandamus, is unreported, and has been reprinted in the appendix to the petition for writ of certiorari ("Pet. App.") at 1a.

COUNTERSTATEMENT OF THE CASE

This matter arises out of investigations by the United States Environmental Protection Agency ("EPA") into contamination at the Keystone Landfill site in Pennsyl-

vania. In July 1990, following lengthy investigations, EPA completed a Remedial Investigation/Feasibility Study ("RI/FS") of the site, characterizing the contamination and discussing cleanup alternatives. On September 30, 1990, EPA issued a Record of Decision ("ROD") in which it selected and explained the site remediation plan. The cost of cleaning up the site was estimated to be at least $9.1 million.

The United States filed suit in the United States District Court for the Middle District of Pennsylvania in 1993, seeking to recover all past and future costs of investigating and cleaning up the site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. §§ 9601-9675. In its complaint, the United States named two groups of defendants—(i) the long-time owners and operators of the Keystone Landfill facility, petitioners Keystone Sanitation Company, Inc., Kenneth F. Noel, and Anna M. Noel (collectively, the "Keystone Defendants"),[1] and (ii) the so-called "Generator Defendants," eight companies[2] that EPA selected from among thousands of similarly situated companies that allegedly generated hazardous substances in wastes that were transported to the site for disposal. The Generator Defendants cross-claimed against the Keystone Defendants, and also filed a third-party complaint against other similarly situated companies that had been identified as potentially responsible parties ("PRPs").[3]

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[1] Keystone Sanitation Company is wholly-owned by Ken and Anna Noel, who are husband and wife.

[2] The Generator Defendants include Quebecor Printing Fairfield Inc. (formerly known as Arcata Graphics Fairfield, Inc.); C & J Clark America, Inc.; The Esab Group, Inc.; The Genlyte Group, Inc.; Hanover Bronze and Aluminum Foundry, Inc.; Kemper Industries, Inc.; R. H. Sheppard Co.; and SKF USA, Inc.

[3] For administrative convenience, EPA had elected not to sue those additional PRPs, relying instead on its claimed entitlement to

Discovery began. In January 1994, after finding out that Keystone Sanitation Company had sold virtually all of its assets to Waste Management of Pennsylvania, Inc., soon after the magnitude of the Keystone Defendants' potential liability for cleanup costs became known, Generator Defendant Quebecor Printing Fairfield Inc. (then known as Arcata Graphics Fairfield, Inc.), on behalf of itself and for the benefit of the other Generator Defendants, served the Keystone Defendants with a notice of deposition and request for production of certain documents, including all documents related to the asset sale and all documents related to the location, use, or expenditure of proceeds from that sale. Apart from providing a heavily redacted version of the asset purchase agreement and a list of employees, the Keystone Defendants refused to comply with the request for documents. In addition, during the depositions that followed, the Keystone Defendants' counsel repeatedly instructed his clients, Ken and Anna Noel, not to answer questions from Quebecor's counsel about the sale of assets to Waste Management or about the disposition of the sale proceeds, including questions about whether the sale was part of an attempt to protect the Keystone Defendants' assets from an eventual judgment against them for CERCLA response costs. The Keystone Defendants' counsel did not contend that the questions sought privileged information, but merely asserted that they were not "reasonably calculated to lead to the introduction of admissible evidence."

Quebecor moved to compel discovery. The District Court ordered the Keystone Defendants to produce the requested documents relating to the asset sale, and also admonished the Keystone Defendants' counsel to stop instructing witnesses not to testify about nonprivileged matters.

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recover from selected PRPs under a theory of joint and several liability.

On June 21, 1994—approximately five months after the initial request for production, and just one day before the deposition of the Noels resumed—the Keystone Defendants produced some documents gathered from files maintained by their attorneys.[4] Although requested, no privilege log was provided to identify any allegedly privileged documents that the Keystone Defendants were either producing or withholding. According to the Keystone Defendants' counsel, there were no such documents.

The production of documents took place at the offices of the Keystone Defendants' attorneys. Quebecor's counsel was permitted to take the documents out of those offices for copying. The Keystone Defendants' counsel did not check to see if any of the documents selected for copying were privileged or otherwise protected from disclosure.

Two of the documents produced by the Keystone Defendants that day are the focus of the petition for certiorari. The first, designated Deposition Exhibit 309, is a printout of an electronic mail message from one of the Keystone Defendants' attorneys to several of his colleagues, including the Keystone Defendants' current trial counsel. The document is dated July 19, 1991—about

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[4] The Keystone Defendants have stated—and continue to state, *see* Pet. at 3—that the documents "completely filled two 10" x 12" x 16" cardboard storage cartons," and "totall[ed] about 10,000 pages." *Id.* at 4. Quebecor's counsel has disputed those allegations, stating in the District Court that the number of pages was far less than 10,000, and estimating the number of documents as "significantly less than 1,000." Even assuming, however, that the Keystone Defendants correctly estimate that the documents "completely filled" about two cubic feet of space, it is clear that this was not a massive document production. Moreover, the District Court would later expressly reject the Keystone Defendants' protestations about "massive production" and the burdens it imposed on the document screening process, finding that, in light of the amount of time that the Keystone Defendants had to collect and review the documents prior to production, "the precautions taken [to prevent inadvertent disclosure of privileged documents] were not reasonable." *See* Pet. App. 14a-15a.

one year after EPA published its RI/FS and ROD discussing the remediation plan for the Keystone Landfill site and the projected costs of cleanup. The document describes communications between the Keystone Defendants and counsel regarding "environmental liability cases," and concludes with the following statement: "I see out [*sic*] main goal, apart from defending the environmental liability claims, is to encourage the Noels to take as much out of the corporation as they legitimatly [*sic*] can do."

The second document, designated Deposition Exhibit 310, is a printout of another electronic mail message generated by another attorney at the same law firm. Like Exhibition 309, Exhibit 310 indicates that it was generated in 1991, the year after EPA disclosed its remediation plan and the projected costs of cleanup. Exhibit 310's one-sentence text reads as follows: "If one is a Florida resident, one's homestead (principal) residence is exempt from levy by creditors, in an unlimited amount." Attached to the printout is an article about the downfall and liabilities of former major league baseball commissioner and lawyer Bowie Kuhn, with highlighted paragraphs discussing allegations that Kuhn sold his $1.2 million home in New Jersey, moved to a new million-dollar house in Florida, and transferred a $2 million investment account to Florida "to take advantage of the legal protection [Florida] provides to personal property in bankruptcies."

On June 22, 1994, the deposition of the Noels resumed. Quebecor's counsel questioned the Noels extensively about a number of the documents that had been produced, including Exhibits 309 and 310. The Keystone Defendants' counsel made no objections to the questions on privilege grounds.[5]

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[5] Questions about Exhibit 310 led to some revealing, if somewhat evasive, testimony from the Noels. For example, regarding a suggestion that the Keystone Defendants might be attempting to transfer assets away from creditors by, for example, moving assets into Florida, Ken Noel admitted that he and his wife had recently bought some property in Florida. In addition, after first denying

Immediately following the deposition, Quebecor's counsel again requested that the Keystone Defendants produce documents related to the asset sale to Waste Management and other asset transfers. Once again, the Keystone Defendants generally refused to comply with the requests, again asserting that the requested documents were "neither admissible nor reasonably calculated to lead to the discovery of admissible evidence." After further attempts to obtain the requested documents, Quebecor's counsel again sought help from the District Court, which held a hearing and, on August 26, 1994, issued an order compelling the Keystone Defendants to respond to Quebecor's discovery requests "fully," "in good faith," and "[w]ithout further delay."

Some documents were produced pursuant to the District Court's order. Others were not. In particular, the Keystone Defendants refused to produce unredacted attorney billing statements related to the Keystone Defendants' transfer and disposition of assets after EPA's investigations of the Keystone Landfill site in 1990. The Keystone Defendants asserted that the billing statements' narrative descriptions of services performed and the names of the attorneys who performed those services were protected from disclosure by the attorney-client privilege and the work-product doctrine. In response, Quebecor pointed out that documents already produced by the Keystone Defendants, including Exhibits 309 and 310, had already revealed the nature and substance of legal advice related to the Keystone Defendants' transfer and contemplated disposition of assets, resulting in waiver of any privilege for other documents on the same subject. The parties took their dispute back to the District Court, which agreed with Quebecor and found that there had been a waiver of any privilege that may have protected from disclosure

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that the Noels had any accounts in any out-of-state banks, Mr. Noel admitted that they might have a small savings account in a bank somewhere in Florida, though he said that he couldn't remember the name of the bank or the city where it was located.

those billing statements relating to the Keystone Defendants' transfer of assets. *See* Pet. App. 11a-16a (District Court's order of October 19, 1994).

The Keystone Defendants still did not produce the requested documents, however. Instead, they filed a "motion for reconsideration." The District Court denied the motion, but agreed to temporarily stay its orders compelling production to permit the Keystone Defendants to petition the Court of Appeals for a writ of mandamus. *See* Pet. App. 17a-21a (District Court's order of January 13, 1995).

On January 19, 1995, the Keystone Defendants filed their petition for a writ of mandamus, contending that (i) Exhibits 309 and 310 were not themselves communications that had been protected by the attorney-client privilege, so their disclosure could not support a finding that any privilege had been waived, and (ii) even if Exhibits 309 and 310 had been protected by the attorney-client privilege, their disclosure waived the privilege only as to those two documents themselves.[6]

Upon order of the Court of Appeals, Quebecor filed an answer to the Keystone Defendants' mandamus petition, setting out the foregoing history of the case[7] and noting that the Keystone Defendants had, among other things, (i) conceded that their "inadvertent" disclosure had waived any privilege that might have protected Exhibits 309 and 310 and (ii) failed to demonstrate, under this Court's standards for mandamus, that the District Court

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[6] It should be noted that, to the extent that the Keystone Defendants had contended in the District Court that the subject documents were protected from disclosure by the attorney work-product doctrine, *see supra* p. 6, those contentions were abandoned in the petition for mandamus and have not been raised in this case since.

[7] To permit the Court of Appeals to verify everything in its counterstatement of the case, Quebecor's answer also included an extensive, 24-tab appendix of documents.

committed a "clear error of law" in not limiting waiver to the documents already disclosed, particularly where there was a prima facie showing that the attorney-client communications had been in furtherance of wrongful ends.

After receiving Quebecor's answer, a three-judge merits panel of the Court of Appeals concluded that oral argument and further briefing on the petition would not be needed. On May 12, 1995, the panel issued its judgment order, summarily denying the petition. *See* Pet. App. 1a-5a. Two weeks later, the Keystone Defendants filed a petition for rehearing and a suggestion for rehearing en banc, both of which were summarily denied. *See id.* at 6a-10a.

The Keystone Defendants still did not produce the documents. They also did not seek a stay of the mandate of the Court of Appeals pursuant to Rule 41 of the Federal Rules of Appellate Procedure pending the filing and disposition of a petition for certiorari in this Court. The Court of Appeals issued its mandate. The District Court's stay of its orders compelling production having now expired, Quebecor again demanded the documents. Again, the Keystone Defendants refused, instead filing yet another motion—this one requesting that the District Court extend the stay of its discovery orders pending the filing and disposition of a petition for certiorari in this Court.

The District Court denied the Keystone Defendants' motion for a stay, and ordered the Keystone Defendants to produce the documents "immediately." *See* Appendix ("App.") included herewith, at 31a-32a. The District Court found that the Keystone Defendants had failed to demonstrate any of the requirements for the requested stay, including the requirement that there was a "reasonable probability" that this Court would grant certiorari. *See id.* at 25a-26a. Moreover, said the District Court, "[t]he court has been most patient and generous in granting stays to the Keystone Defendants on this matter up to this point, and finds that with the disposition of

the preliminary injunction matter [8] . . . and the impending need to consider permanent injunction relief in this matter, the time is ripe to complete the discovery on this issue." *See id.* at 26a.

The Keystone Defendants refused to comply with the district court's order to produce the documents "immediately," and also failed to respond to still another written demand for the documents from Quebecor. Instead, they filed with the Court of Appeals another motion for stay pending disposition of their petition for certiorari. That motion was summarily denied. The Keystone Defendants still refused to produce the documents and, on September 5, 1995, filed yet another motion for stay with this Court's Justice Souter, who summarily denied the motion the next day without waiting for any response.

Back in the District Court, the Generator Defendants have filed a motion for contempt and motion for sanctions against the Keystone Defendants based on their actions in this discovery battle. In response, the Keystone Defend-

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[8] On the same day that it denied the Keystone Defendants' motion for a further stay, the District Court, upon the motion of Quebecor and others, also issued a preliminary injunction enjoining the Keystone Defendants and various related entities and individuals from "transferring, dissipating, encumbering, or otherwise adversely affecting the value of any cash, real or other property, or any other assets" in the possession of Keystone Sanitation Company or any of certain other related entities. *See* App. 29a. The District Court found that "the Generator Defendants are likely to succeed in showing that the Keystone Defendants have transferred and will continue to transfer assets to avoid paying a potential CERCLA judgment, that they will be without funds to satisfy a CERCLA judgment absent injunctive relief, and that the Generator Defendants are likely to suffer irreparable harm of being saddled with the Keystone Defendants' share of joint and several liability if injunctive relief is not granted." *See id.* at 20a. The District Court additionally granted the Generator Defendants leave to amend their cross-claim against the Keystone Defendants to assert a state-law claim for fraudulent conveyance. *See id.* at 20a-21a, 28a.

ants have turned over a few of the documents that they had been ordered to produce.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED IN THE PETITION HAS NOT BEEN PRESERVED FOR REVIEW.

As Quebecor pointed out to both courts below in successfully opposing the Keystone Defendants' motions for a stay pending filing and disposition of the petition for certiorari in this Court, the Keystone Defendants' petition for mandamus in the Court of Appeals raised only two arguments. First, the Keystone Defendants contended that there could be no waiver of privilege in this case because the documents that were "inadvertently" disclosed were not even privileged documents themselves. *See* Petition for Mandamus at 10-13. Apparently recognizing that no "certworthy" issue is presented by that argument, the Keystone Defendants have now conceded—though apparently for purposes of this Court's review only—that "it is undisputed that [Exhibits 309 and 310] were covered by the attorney-client privilege." *See* Pet. at 5 n.4 and accompanying text.

The Keystone Defendants' second argument to the Court of Appeals—and the only remaining basis for certiorari review by this Court—was that, "[e]ven if exhibits 309 and 310 could have been subject to a claim of attorney client privilege, any waiver of privilege as a result of their production should have been limited to the documents themselves." *See id.* at 14-16. The Keystone Defendants *never* contested the issue of whether a privileged document loses its protection upon inadvertent disclosure. Rather, they *expressly conceded* that issue, and did so in language that was both unambiguous and expressly applicable to the facts of this case. *See id.* at 14 ("If exhibits 309 and 310 could have been made the subject of a successful claim of attorney client privilege, there would be a waiver of privilege with regard to those documents them-

selves even through inadvertent disclosure."). Thus, although the Keystone Defendants' current counsel in this Court now assert that the federal courts are divided as to whether and under what circumstances inadvertent disclosure results in a waiver of the privilege, *see* Pet. at 7-8, that alleged split of authority[9] is irrelevant to this case,

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[9] Contrary to the petition's suggestions of a circuit split, *see* Pet. at 8, neither the Eighth Circuit in *John Morell & Co. v. Local Union 304A*, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991), nor the Ninth Circuit in *United States v. Zolin*, 809 F.2d 1411 (1987), *aff'd in part and vacated in part*, 491 U.S. 554 (1989), held that "an inadvertent disclosure of privileged information does not waive the privilege." Rather, each court simply found that, *under the particular circumstances of the case*, the disclosure of certain documents or tapes did not result in waiver of their privileged status. In *John Morell*, documents reflecting attorney-client communications between a company and its counsel were disclosed by a third party that was sharing a joint defense with the company and had obtained the documents in the course of that joint defense. The Eighth Circuit found no evidence that the company itself, or anyone with authority to act on its behalf, had taken any actions that could constitute waiver, and the disclosure by the co-defendant would not change that result. *See* 913 F.2d at 555-56. In *Zolin*, the Ninth Circuit affirmed, under a "clearly erroneous" standard of review, a district court's finding that a secretary's delivery, to a third party, of tapes believed to be blank would not constitute waiver of any allegedly privileged communications contained on the tapes, and at the same time also affirmed the district court's finding that there *had* been a waiver of privilege with respect to documents that had been made available to that same third party under a general grant of permission to review documents, even though there had been no specific permission to review any allegedly privileged documents. *See* 809 F.2d at 1415-17. The *Zolin* decision cannot fairly be read as a holding that "inadvertent" disclosure cannot result in waiver of the privilege. Indeed, Ninth Circuit case law, both before and after the *Zolin* decision, has expressly rejected that position. *See, e.g., United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990) (citing, with approval, *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981)).

In sum, there appears to be no split in the circuits as to whether an inadvertent disclosure *can* waive the privilege; at most, there may be a lack of consensus about whether disclosure *may* or *must*

as is the view of the Keystone Defendants' current counsel that the "correct" rule is that inadvertent disclosure does not waive the privilege. *See* Pet. at 13-22. Similarly, having conceded in the Court of Appeals that any privilege was waived with respect to Exhibits 309 and 310, the Keystone Defendants have failed to preserve for this Court's review their current counsel's further contention, *id.* at 14-15, that an attorney's disclosure, without the knowledge or consent of the client, does not result in waiver of the client's privilege.

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE SCOPE OF WAIVER RESULTING FROM INADVERTENT DISCLOSURE OF PRIVILEGED DOCUMENTS.

As discussed above, the only question that the Keystone Defendants have even arguably preserved in this Court is whether the Court of Appeals should have issued the writ of mandamus to restrict the scope of the waiver of privilege to those documents that had already been disclosed. The Courts of Appeals, however, have consistently held that, where the privilege in an attorney-client communication is waived, that waiver may extend to other communications relating to the same "matters" or "subject matter," even though the waiver may have resulted from an "inadvertent" disclosure. *See, e.g., Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th

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result in waiver. *See, e.g., Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (surveying cases). As the petition acknowledges, however, *see* Pet. at 7, the District Court in the instant case did not apply a *per se* waiver rule, but rather found waiver only after applying a five-factor analysis to the specific facts of the case. *See* Pet. App. 14a-16a. The Court of Appeals could therefore affirm the District Court's finding of waiver in this case without ever reaching the question of whether a *per se* rule of waiver or a multi-factor analysis for determining waiver should apply. Thus, even if the issue had been raised rather than conceded below, no such circuit split could be implicated by the Court of Appeals' denial of mandamus.

Cir. 1992); *John Morell*, 913 F.2d at 556; *In re Sealed Case*, 877 F.2d 976, 980-81 (D.C. Cir. 1989); *Weil*, 647 F.2d at 24. For the contrary proposition that an "inadvertent" disclosure waives the privilege only with respect to the documents actually disclosed, the Keystone Defendants' petition to this Court cites only a few district court opinions, *see* Pet. at 9, 21-22, but a conflict among district courts, or between a Court of Appeals and district courts, creates no basis for certiorari review. *See, e.g.*, ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.8 (7th ed. 1993).[10]

III. THERE IS NO BASIS FOR ASSUMING THAT, IN SUMMARILY DENYING MANDAMUS RELIEF, THE COURT OF APPEALS DECIDED ANY OF THE ISSUES NOW BEING RAISED IN THE PETITION.

The Keystone Defendants assert that, in denying mandamus, the Court of Appeals "directly ruled upon" the question presented by the petition. *See* Pet. at 24. "Thus," say the Keystone Defendants, "the issues upon which the lower federal courts have split are squarely presented in this case." *Ibid.*

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[10] Moreover, even where trial courts have chosen to limit waiver to those documents actually disclosed because disclosure was "inadvertent," they have indicated that they might not find disclosure to be truly "inadvertent" if the actions to protect the documents or rectify the disclosures were insufficient. *See, e.g., Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group*, 116 F.R.D. 46, 52 (M.D.N.C. 1987) ("In this case, the Court finds defendant's procedures adequate to preclude a finding of waiver except as to the Roberts letter itself which has already been fully disclosed."). Thus, even those courts might find subject-matter waiver in the case at hand, where, among other things, there was a finding that "the precautions taken were not reasonable," *see* Pet. App. 15a, and the Keystone Defendants' counsel (i) made no attempt to secure the return of the documents that were disclosed, (ii) permitted their clients to be deposed extensively about the disclosed documents, and (iii) refused even to acknowledge that they had disclosed privileged documents until their filing of the petition in this Court.

Wrong. Putting aside the fact that the question presented by the petition was never even raised in the Court of Appeals, *see supra* pp. 10-12, that court's summary denial of mandamus can hardly be read as a "direct ruling" on any particular issue raised—or not raised—below. Moreover, there is no reasonable basis to infer, simply for purposes of this Court's review, that the Court of Appeals reached any of the matters now being raised in the petition for certiorari. As Quebecor pointed out in its answer to the Keystone Defendants' petition for mandamus in the Court of Appeals, there were a number of bases upon which mandamus could properly be denied. For example, the Keystone Defendants failed to show, as is required by this Court, *see, e.g., Kerr v. United States Dist. Court*, 426 U.S. 394, 403 (1976), that they had no other adequate means of relief. The Keystone Defendants' petition for mandamus merely asserted that "the harm caused by the production of documents and testimony compelled by the district court would be irreparable." Petition for Mandamus at 7. The petition never explained, however, why any damage resulting from an erroneous order to compel production could not be remedied on appeal after final judgment—through, for example, a ruling ordering a new trial, with all improperly obtained documents and information excluded from evidence. *See, e.g., Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 860 (3d Cir. 1994); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749 (10th Cir. 1993).[11]

The Keystone Defendants also failed to show, as is required by this Court, *see, e.g., Kerr*, 426 U.S. at 403, that their right to the writ of mandamus was "clear and

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[11] As Quebecor pointed out to the Court of Appeals, the Keystone Defendants also failed to seek certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) prior to filing their petition for mandamus, even though the Court of Appeals had previously indicated that it "ordinarily" denies a petition for mandamus where "interlocutory appeal seems a practical but untried avenue." *See In re School Asbestos Litig.*, 977 F.2d 764, 774 (3d Cir. 1992).

indisputable." The petition for mandamus never identified any clear error of law in the District Court's determination, Pet. App. 20a-21a, that the scope of the waiver of privilege should encompass, and be limited to, communications regarding "the disposition of Keystone Sanitation Company and personal assets after the onset of the CERCLA investigation that led to this action." The petition for mandamus simply suggested that the District Court should have refused to allow any further inquiry into attorney-client communications revealed in documents "in the absence of evidence that waiver is being used selectively [by the Keystone Defendants] to prejudice an adverse party." *See* Petition for Mandamus at 15-16. The petition never addressed the various factors and findings, Pet. App. 14a-16a, that led the District Court to its determination of the scope of waiver.

Finally, and perhaps most revealing, the Keystone Defendants have never addressed—in their petition for mandamus or anywhere else—Quebecor's argument that Exhibits 309 and 310, along with all of the other documentary and testimonial evidence gathered in the case, established a prima facie case of fraudulent conveyance "sufficient to satisfy the judge that the light should be let in," *Clark v. United States*, 289 U.S. 1, 14, 15 (1933), under the so-called crime-fraud exception to the attorney-client privilege. *See, e.g., Zolin*, 491 U.S. at 562-63. As Quebecor pointed out to the Court of Appeals in its answer to the petition for mandamus, the District Court had observed in its October 19, 1994, order, which first found waiver in this case,

> the primary goal of CERCLA is to ensure that liable parties bear their fair shares of the costs of environmental clean-up. To preclude discovery as to whether principal potentially responsible parties are or were engaged in the deliberate dissipation of assets for the purpose of avoiding a share of liability runs directly counter to that goal. To do so based upon a claim of privilege, when there has been an inadvertent dis-

> closure of documents *suggesting that this is the case*, runs counter to the interests of justice.

Pet. App. 15a-16a (emphasis added). Moreover, as the Court of Appeals was informed, the District Court continued to receive additional evidence of a scheme of fraudulent conveyances—for example, documents revealing that, on a single day shortly after the asset sale to Waste Management, (i) Keystone Sanitation Company transferred $1.1 million to Kenneth Noel in a dividend check signed by Anna Noel, (ii) the Noels wrote a $1.1 million check to Flatbush Golf Course, Inc., a company that they had recently transferred for no consideration to their children, and (iii) Anna Noel, acting on behalf of Flatbush Golf Course, Inc., wrote a check in the amount of $933,507.17 to retire the outstanding mortgage on the Flatbush golf course.[12] Neither the Keystone Defendants nor their counsel have ever denied the multitude of documented transfers among the Noels and various persons and entities controlled by the Noels, and it appears undisputed that the evidence of a scheme of fraudulent conveyances, carried out with the assistance of counsel, was sufficient to satisfy the crime-fraud exception and thus justify the scope of disclosure required by the District Court.[13]

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[12] These and other apparently fraudulent transactions have been described by the District Court in some detail. *See* App. 15a-20a.

[13] Furthermore, in issuing the preliminary injunction against the Keystone Defendants after the Court of Appeals denied mandamus, *see supra* p. 9 n.8, the District Court reiterated its earlier finding that Exhibits 309 and 310 "strongly suggested that [the Keystone Defendants' attorneys] had actively advised the Keystone Defendants how to take assets out of [Keystone Sanitation Company] at a significant point in the EPA's activities at the Keystone site." *See* App. 6a. Moreover, having reviewed volumes of evidence presented in connection with the preliminary injunction hearings, the District Court found that the evidence "strongly support[s]" the Generator Defendants' claims that the Keystone Defendants have engaged in a scheme of deliberately dissipating assets to avoid paying a potential CERCLA judgment while con-

In light of the many, fully adequate reasons that were presented to the Court of Appeals to support a denial of mandamus, there is no basis for assuming that the Court of Appeals ever had to reach any of the issues that the Keystone Defendants have presented for this Court's review.

IV. THE PETITION IGNORES THIS COURT'S WELL-SETTLED STANDARDS GOVERNING EXTRAORDINARY WRITS, UNDER WHICH THE COURT OF APPEALS' DENIAL OF MANDAMUS WAS CLEARLY CORRECT.

Regarding the procedural posture of this case—a petition for certiorari review of a summary denial of mandamus relief from a trial court's interlocutory orders—the Keystone Defendants say only that "[t]he fact that the legal issues were presented to the Third Circuit on a petition for mandamus is no impediment to this Court's review." *See* Pet. at 24-25. Although there is, of course, no *jurisdictional bar* to certiorari review of a denial of mandamus, this Court has repeatedly counseled that the issuance of a writ of mandamus in anything less than an extraordinary situation would defeat Congress' policy against piecemeal appellate review. *See, e.g., Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) Moreover, this Court has further instructed the Courts of Appeals that, as to matters—such as discovery rulings—that are left almost entirely to the trial court's exercise of its discretion, a writ of mandamus is almost never warranted. *See, e.g., id.* at 36. Finally, this Court has noted that, even where a party has satisfied the stringent conditions for issuance of a writ of mandamus, "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr*, 426 U.S. at 403.

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tinuing to control those assets through related entities. *See* App. 15a-20a.

In this case, the Keystone Defendants unlawfully hindered discovery, voluntarily produced documents reflecting a scheme to avoid judgment creditors, failed to show that there were no adequate means of relief other than by way of mandamus, and failed to show any clear legal error by the District Court. Under such circumstances, the issuance of a writ of mandamus might well constitute an abuse of discretion warranting this Court's intervention. *Cf. Allied Chem. Corp.*, 449 U.S. at 34-37 (reversing the issuance of a writ of mandamus). But its denial plainly does not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

[Filed Aug. 14, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 1:CV-93-1482

(Rambo, C.J.)

UNITED STATES OF AMERICA,
Plaintiff

v.

KEYSTONE SANITATION COMPANY, INC.; KENNETH F. NOEL, individually and f/d/b/a KEYSTONE SANITATION COMPANY; ANNA M. NOEL, individually and f/d/b/a KEYSTONE SANITATION COMPANY; QUEBECOR PRINTING FAIRFIELD, INC.; C & J CLARK, AMERICA, INC.; THE ESAB GROUP, INC.; THE GENLYTE GROUP, INC.; HANOVER BRONZE AND ALUMINUM FOUNDRY, INC.; KEMPER INDUSTRIES, INC.; R.H. SHEPPARD COMPANY, INC.; and SKF USA, INC.,
Defendants

v.

ADVANCED DISPOSAL SERVICE, *et al.*,
Third-party Defendants

MEMORANDUM

I. *Introduction*

In this action initiated by the United States of America under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a), as amended by the Superfund Amendments and Reauthoriza-

tion Act (SARA), (hereinafter CERCLA, § 107(a)), the original Defendants grouped as "Generator Defendants" have moved for a preliminary injunction. The Generator Defendants seek to prevent and/or halt the dissipation of assets now or formerly belonging to original Defendants Keystone Sanitation Company ("Keystone"), Kenneth Noel, and Anna Noel (collectively, the "Keystone Defendants"). As related matters, the Generator Defendants also filed motions: (1) to amend their deemed crossclaim against the Keystone Defendants [1] to assert a state law claim for fraudulent conveyance under 39 P.S. Section 351 *et seq.*, and 12 Pa. Cons. Stat. Ann. Section 5101-5110 *et seq.*; (2) to join as additional defendants to that crossclaim the Noels' four adult children, the separate Trusts created for each of the four children, the Noel Family Trust, Trustee Mary Keller (Anna Noel's sister), and the Flatbush Golf Course, Inc., which formerly was owned by the Noels, but is now in trust for their children; and (3) for a preliminary and permanent injunction against these additional defendants to prevent further conveyances and dissipation of the assets, and to compel the return to Keystone and the Noels of fraudulently conveyed property.

The basic facts underlying the litigation have been set forth in previously published memoranda. An understanding of the instant decision will benefit from a brief reiteration of basic CERCLA law, along with a thorough explanation of the labrynth of facts, motions, and rulings that are intertwined with this request for injunctive relief.

II. *Procedural History*

On September 27, 1993, the United States initiated this CERCLA action to recover costs expended by the Environmental Protection Agency (EPA) in responding

[1] In its initial case management order, the court deemed all original Defendants to have asserted contribution and indemnification crossclaims against one another.

to the contamination of the Keystone Sanitation Landfill Site up until September 27, 1990. The complaint also seeks a declaratory judgment of the liability of the Defendants for future response costs that will be incurred in implementing remedial action at the Site. Pursuant to CERCLA's § 107(a) framework, the United States named eleven Defendants as potentially responsible parties (PRPs). Eight of the original PRPs—those referred to as the "Generator Defendants"—were joined under § 107(3), on the theory that they contracted, agreed, or otherwise arranged to dispose of hazardous waste at the Keystone Site or transport such waste to the Site. These Generator Defendants are represented by Liaison Counsel. The other three original PRPs—those referred to as the Keystone Defendants, were joined under § 107(a)(1), (2), and/or (3) as the owners or operators of the Keystone Site and as arrangers and transporters of waste to the Site. The Keystone Defendants are represented by the law firm of Reed, Smith, Shaw & McClay.

In August 1994 the Generator Defendants joined numerous Third-Party Defendants as additional PRPs. These Third-Party Defendants are represented by Liaison Counsel, with the exception of Waste Management of Pennsylvania, Inc. (Waste Management).[2] The Third-Party Defendants, in turn, are now in the process of identifying numerous Fourth-Party Defendants for joinder in the near future.

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[2] Waste Management interests are set apart from those of the other Third-Party Defendants because not only has it been joined as a PRP in its own right, it is also the purchaser of Keystone's assets, and so is at the center of a successor liability dispute in this action. The successor liability issue is to be resolved by this court upon completion of discovery on the matter, which was one of the few categories of discovery permitted during the settlement period established by this court's March 21, 1995, order. A recent submission from Waste Management indicates that the discovery will be completed in approximately mid-August, after which the parties are due to submit a proposed schedule for addressing the issue.

Under CERCLA's strict liability scheme, each original PRP found to have transported any amount of hazardous waste to the Keystone Site is subject to joint and several liability to the United States regardless of relative responsibility, unless a PRP can show that its harm was divisible. *See Tippins Inc. v. USX Corp.*, 37 F.3d 87, 92 (3d Cir. 1994); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 257-58 (3d Cir. 1992) (citations omitted). It follows that, in theory, the United States could recover the full amount of any ultimate judgment from any one liable PRP. As a practical matter, in most CERCLA § 107(a) actions, liability is eventually apportioned among all liable original and additional PRPs through the contribution action available under CERCLA § 113(f)(1) or, more likely, through settlement procedures that encompass equitable contribution principles. Nonetheless, the prospect that a PRP which should bear a substantial share of the ultimate liability will be unable to do so is of serious concern to other CERCLA Defendants.

With this liability scheme confronting them, the Generator Defendants requested this court to grant them injunctive relief based on allegations that the Keystone Defendants have transferred and will continue to transfer Keystone and personal assets to the Noels' adult children or other relatives, or to the children's trusts, for the purpose of removing the assets from the reach of this litigation. Allegations to this effect have been voiced for some time, and it is worth tracking the sequence of motions, conferences, and orders that have addressed the allegations to date.

To begin with, on August 12, 1994, the court approved a stipulation whereby Keystone itself was enjoined from transferring any of its assets pending the outcome of this litigation, with the exception that Keystone could, *inter alia*, make payments to the Noels in the ordinary course of business, as defined therein. This stipulation did not address the transfer of the Noels' personal assets, or any

conveyances by the Keystone Defendants that might have occurred prior to the entry of the stipulation. The Noels refused to sign a stipulation that would limit the amount they could take from Keystone for themselves, or prevent them from disposing of assets previously taken from Keystone after the initiation of the EPA's investigation of the Keystone Site.

On August 24, 1994, the court first addressed the allegations of ongoing dissipation of assets, when it held an in-person conference with counsel for the Generator Defendants, and counsel for the Keystone Defendants. At that conference, the Generator Defendants directly alleged that after the EPA commenced its investigation of the Keystone Site, the Noels commenced a plan to divest themselves and Keystone of assets for the specific purpose of escaping any share of the response costs sought by the United States. The immediate goal of the Generator Defendants at that point was to obtain responses from the Keystone Defendants to discovery requests directed to the Noels' personal finances, the sale of Keystone assets to Waste Management of Pennsylvania, Inc., and the disposition of those proceeds and other sums of money, for the time period between 1990 and August 1994. The Generator Defendants questioned whether the Noels' transferred to themselves proceeds from the sale to Waste Management, or other assets from Keystone. They also questioned the Noels' transfers of funds to their adult children. The Noels refused to respond to the requests, claiming that such information would be pertinent, if ever, to the execution of any eventual judgment, and that requiring the Noels to produce it would be burdensome and invasive of their privacy at that point.

The court disagreed, and on August 26, 1994, issued a memorandum and order directing the Noels to respond to the discovery requests. The court reasoned that one of CERCLA's primary goals was to ensure that those who cause or profit from contamination of the environment

will bear the costs of clean-up. As owners of the Keystone Site, the Noels are likely to be held liable for a substantial share of all approved response costs, so the court found it preferable to learn at that time whether there was any merit to the allegations about dissipation of assets. Therefore, the court ordered the Noels to respond to discovery requests directed to the transfer of their personal assets since 1990, the sale of Keystone assets to Waste Management, the disposition of any of the stock and cash received through the sale to Waste Management, and the Noels' financial dealings with Keystone. The court further directed the Keystone Defendants to submit a detailed statement of any privilege claimed in response to the discovery requests. The parties then proceeded with discovery on the assets issue, and the Keystone Defendants did produce certain documents.

Another major dispute arose in October 1994, however, when the Generator Defendants wrote to the court concerning the Keystone Defendants' refusal to provide unredacted attorney billing statements that alluded to their transfers of assets. The Keystone Defendants refused to provide them on the grounds of the attorney-client privilege and work product doctrine, but the Generator Defendants maintained that the Keystone Defendants waived any privilege by inadvertently producing printouts of electronic mail messages between attorneys at the law firm of Reed, Smith, Shaw & McClay. These printouts strongly suggested that the attorneys had actively advised the Keystone Defendants how to take assets out of Keystone at a significant point in the EPA's activities at the Keystone Site.

On October 19, 1994, the court ruled that due to the inadvertent disclosures, the Keystone Defendants had waived any privilege that might have protected their attorneys' billing statements from disclosure, but narrowly interpreted the waiver to reach only billing statements that

referenced narratives and identities of attorneys related to the Keystone Defendants' disposition of assets since 1990. Accordingly, the court directed the Keystone Defendants to produce in unredacted form all attorney billing statements concerning legal services related to any transfers of assets discussed in the court's August 26 order.

The Keystone Defendants did not produce the billing statements but, instead, moved for reconsideration of the order. About the time that motion became ripe, the Generator Defendants filed their request for injunctive relief. The court scheduled an injunction hearing for January 20, 1995, and meanwhile proceeded with the motion for reconsideration. On January 13, the day the court was completing its memorandum on that motion, the parties contacted the court with yet another discovery dispute revolving around the assets issue. The deposition of Anna Noel was being taken for the preliminary injunction hearing, and the Generator Defendants had asked Mrs. Noel about any communications between her and her accountant and/or her attorneys related to the disposition of the assets of Keystone and the Noels. Her counsel asserted an accountant/client privilege, as well as the attorney/client privileges.

After conducting a conference call to discuss the dispute, the court issued the January 13 memorandum, which addressed both the motion for reconsideration and the privilege claims asserted in Anna Noels' deposition. Adhering to its October 19, 1994, ruling, the court again directed the Keystone Defendants to produce the billing memoranda, and further ruled that the same waiver applied to the deposition questions directed to Anna Noels' communications with her attorneys about the transfer of Keystone and personal assets. As to the accountant, the court held that federal common law applied to the issue, and there was no federal accountant/client privilege.

The Keystone Defendants then asked the court to stay the January 13 ruling insofar as it addressed the attorney/

client privilege, while they petitioned the Third Circuit Court of Appeals for a writ of mandamus. The court complied, but the Third Circuit denied the mandamus petition by order dated May 12, 1995. The Keystone Defendants then made a request for either panel or *en banc* rehearing. The Third Circuit refused and issued its mandate on the matter on June 19, 1995. Still resolute, the Keystone Defendants moved this court to continue the stay of its October 19, 1994, and January 13, 1995, orders, while they petitioned for a writ of certiorari to the United States Supreme Court to appeal the Third Circuit's denial of mandamus. The briefing on this latest motion to stay was completed on July 10, 1995, and the court will address it at the end of this memorandum.

Meanwhile, the court had conducted the preliminary injunction hearing on January 20, 1995, which was a consolidated hearing for purposes of the requests for injunctive relief against the Keystone Defendants and the proposed additional crossclaim defendants. The hearing had to be abbreviated due to this court's urgent personal matter. Therefore, the parties agreed to submit the hearing testimony of Anna Noel by deposition. This deposition was taken on January 30, 1995, transcribed, and submitted to the court on February 14, 1995. Thereafter, the parties submitted proposed hearing exhibits as well as additional briefs and correspondence on the issues.

Shortly thereafter, the court held the case management conference of March 17, 1995. At that conference, the court and the parties discussed the management of the Third-Party action, settlement efforts, and the question of judicial review and discovery regarding the EPA's Record of Decision and the administrative record. The result was that a period of time was set aside to focus on settlement. Counsel for the Keystone Defendants represented that the status quo would not change with respect to the assets of the Keystone Defendants, the Noels, and

their children. Therefore, consideration of the request for injunctive relief was set aside for a time.

The settlement period now has ended. The court recently ruled on the issue of discovery beyond the administrative record, and in the near future the court will embark upon judicial review of the ROD and administrative record. The Keystone Defendants have suggested that a decision on the ROD is necessary before any decision can be made with respect to the Generator Defendants' request for injunctive relief. The court does not agree that consideration of the request for injunctive relief need be delayed any further, and will now address it.

III. *Discussion*

A. *The Law*

The threshold issue here is whether a district court has the authority to enjoin a defendant from dissipating assets on the grounds that it is necessary to ensure the ability of the defendant to satisfy a money judgment against it. The court finds that there is such authority, although any encumbrance must be reasonably related to the amount of the ultimate potential judgment. *See Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 194-97 (3d Cir. 1990); *see also In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1476-1480 (9th Cir. 1994).

A party seeking such relief must first satisfy the well-established preliminary injunction standards. These standards include: (1) a reasonable likelihood of success on the merits; (2) irreparable injury to the movant if the injunctive relief is not provided; (3) a showing that the grant of injunctive relief will not result in greater harm to the nonmoving party than the denial would visit upon the moving party; and (4) a showing that granting the injunction would serve the public interest. *See Gerardi v. Pelullo*, 16 F.3d 1363, 1373 (3d Cir. 1994); *Hoxworth v. Blinder*, 903 F.2d at 197-98.

The Keystone Defendants have made no effort to deny that transfers of assets occurred. They urge, instead, that any transfers were proper and, more important, that the court lacks authority to enjoin any assets in the possession of the Noels or the proposed additional crossclaim defendants. The Keystone Defendants place considerable emphasis on the language in *Hoxworth* requiring a determination of a "reasonable relationship" between the amount and type of encumbered assets and the expected recovery. They suggest that the Generator Defendants must establish the Keystone Defendants' likely share of liability with precision, as well as the likely inadequacy of their assets to satisfy such liability, and they say that the Generator Defendants cannot do so at this stage of this litigation. They further propose that the Generator Defendants cannot deny liability to the United States, as they have done in certain pleadings and discovery materials, and yet establish a likelihood of harm by being subject to a disproportionate share of CERCLA liability to the United States.

As a corollary, the Keystone Defendants maintain that in order for this court to make an acceptable determination of any party's potential liability for purposes of these injunction proceedings, it must first complete its judicial review of the ROD and rule on whether the costs and expenses claimed by the EPA will, in fact, be assessed against any of the Defendants in this case. In that regard, the Keystone Defendants claim that the only potential liability that is ascertainable at this point amounts to approximately $500,000.00—that is, the approximate $1.4 million actually spent by the EPA on the Keystone Site to date, minus the amount already recovered through the *de minimis* consent decree entered in the related *United States v. Borough of Lemoyne,* 4:CV-93-0667 (M.D. Pa. 1994). In sum, their position is that other than this $500,000.00 in past response costs, neither their CERCLA liability, nor that of the Generator Defendants, is sufficiently ascertainable to satisfy *Hoxworth.*

The court does not read *Hoxworth* as requiring so precise a calculation of potential damages. In *Hoxworth*, the Third Circuit simply made it clear that a preliminary injunction is appropriate where there are extraordinary circumstances indicating that one is necessary to preserve a damages remedy. The *Hoxworth* court's caveat was that such relief is never appropriate without an attempt to ensure that the value of the assets encumbered bears some reasonable relationship to the likely amount of plaintiff's expected recovery, and without a determination that an unsatisfied money judgment would constitute irreparable injury to the party seeking the injunction. The *Hoxworth* court also indicated that the property to be encumbered should be the same as that which would be subject to the any liability at issue in the case. The *Hoxworth* court vacated the injunction entered in that case because the district court had made no such determinations.

In applying *Hoxworth* to a CERCLA action, the only sensible approach is to consider CERCLA's strict, joint and several liability, the costs estimated in the ROD, the identity of the PRP against whom injunctive relief is sought, and the property sought to be encumbered and its relationship to the CERCLA action. From there, the court can determine whether to encumber any of the PRP's assets and, if so, how much would bear a reasonable relationship to the ultimate potential liability of the PRP. The court does not believe that *Hoxworth*'s "reasonable relationship" requirement encompasses a precise calculation of each party's ultimate CERCLA liability, a determination that necessarily is made well into any CERCLA cost recovery litigation. If that were the case, *Hoxworth* could never be applied to prevent the dissipation of a CERCLA defendant's assets.

The Keystone Defendants' suggestion that judicial review of the ROD must be completed prior to encumbering any assets is untenable. Judicial review of the ROD is

likely to be the most time-consuming and demanding endeavor the court will undertake in this litigation. The court cannot disregard the specter of the Keystone Defendants' dissipation of assets until it is completed. Of course, in theory, the $11.9 million quoted by the EPA could be reduced if judicial review of the ROD reveals arbitrary and capricious spending or remedy selection on the part of the United States. Without suggesting that the court will do anything less than a thorough judicial review, it must be conceded that given the substantial judicial deference owing to the EPA's decisions in these matters, most cases will not result in clean-up costs that are a fraction of the EPA's estimated costs, as the Keystone Defendants suggest is possible here.

In sum, the demonstrated threat that one PRP will dissipate its available assets and thereby saddle other CERCLA PRPs with a disproportionate share of liability can provide sufficient grounds for the grant of injunctive relief to preserve a pool of assets for payment of damages. The availability of such relief would be meaningless, if it were precluded pending resolution of the review of the ROD and application of CERCLA's joint and several liability and contribution schemes. A court must rely on the costs set forth in the ROD in evaluating a request for injunctive relief, absent some obvious reason to believe that they cannot be accurate. The court finds no such obvious reason here.[3]

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[3] A decision from another district court in this circuit lends support to this court's decision. *See In re Tutu Wells Contamination Litigation*, 157 F.R.D. 367 (D.V.I. 1994) (in CERCLA case, district court granted request of PRPs to enjoin a Delaware state court proceeding, which would have distributed trust set up for dissolved corporate PRP before final decision could be reached in CERLCA case; potential judgment by Delaware court permitting distribution of assets and possible exhaustion of assets and extinction of civil life of corporation was valid concern of other PRPs; PRPs might then be deprived of possibility of recouping dissolved PRP's assets for use in paying response costs of the cleanup, which would increase other PRPs' liabilities for response costs); *see also*

Here, the United States has estimated that the final bill for the clean-up will be approximately $11.9 million, and this court has tentatively accepted that figure for purposes of approving the *Borough of Lemoyne* consent decree. That decree was approved on the theory that the nearly $1 million dollars the United States would obtain from the *de minimis* PRPs would represent their fair and reasonable contribution to that $11.9 million dollars. The Keystone Defendants' suggestion that they, who owned and profited from the operation of the Keystone Site for nearly twenty-five years, might simply be required to split another $500,000.00 in clean-up costs with the other Defendants approaches absurdity. As the Generator Defendants accurately noted, owner/operators of waste facilities are frequently assessed forty to fifty percent of the total costs of clean-up efforts.[4] Furthermore, while it is true that the EPA has incurred only $1.4 million in past response costs to date, the court's preliminary examination of the ROD precludes a serious contention that there is no need for further remedial work at the Site, or that the costs of such work will be minor.

Thus, the Generator Defendants have succeeded in showing a reasonable likelihood that the Keystone Defendants and the Generator Defendants will be held strictly, jointly and severally liable for the $11.9 million remedy ultimately designed by the EPA for the Keystone Site, that in a contribution action the Keystone Defendants will be assessed a significant share of that amount, and that it would be assessed against the cash and other assets in the possession of Keystone and the Noels. The question remains whether the Generator Defendants have shown that the Keystone Defendants' transfers of their assets

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In re Tutu Wells Contamination Litigation, 885 F. Supp. 776 (D.V.I. 1995) (in same case, court entered permanent injunctive relief).

[4] The court does not mean to suggest that the Keystone Defendants are certain to be held liable for that portion here.

since 1990 is reasonably likely to preclude their satisfaction of any CERCLA liability judgment, exposing the Generator Defendants to a threat of irreparable harm absent court action to recover some or all of the assets and enjoin their further disposition. The court turns to the evidence introduced at the preliminary injunction hearing to answer those questions.

B. *The Evidence*

In connection with their motion for preliminary injunction against the Keystone Defendants, the Generator Defendants submitted an "appendix," which partly documented the Keystone Defendants' transfer of Keystone assets to themselves and then to their four adult children, the Trusts created for them, the Flatbush Golf Course, Inc., and Mrs. Noel's sisters. At the preliminary injunction hearing, the Generator Defendants introduced an additional four volumes of evidentiary materials which elaborated on this theme.[5] Keystone also submitted exhibits, both at the hearing and subsequent to it, with its post-hearing brief.[6]

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[5] Some documents contained in the four volumes of exhibits introduced at the hearing are repetitive of those submitted with the appendix. Where that is the case, the court refers to the documents as they appear in the four volumes.

[6] In correspondence sent to the court, the Generator and Keystone Defendants squabbled over the admissibility of the Keystone Defendants' exhibits. Many of the Keystone Defendants' exhibits consisted of the pleadings already of record before this court, and the Generator Defendants' discovery responses in other contexts in this litigation, and apparently were being offered to support the Keystone Defendants' point that by taking contrary positions earlier in this matter, the General Defendants are precluded from showing the likelihood that they or the Keystone Defendants will be exposed to liability in this matter. The court is quite unpersuaded by that point. In any case, the court will not belabor the admissibility of the exhibits, given the nature and circumstances of these proceedings, and the fact that the Generator Defendants' objections are based largely on relevance. The court considered all

Volume 1 of the Generator Defendants' exhibits contains tax returns from 1989 to 1993 for the Noels and Keystone; tax returns from 1988 to 1993 for the Flatbush Golf Course, Inc., tax returns from 1991 to 1993 for the Brian K. Noel Separate Trust; and 1990 gift tax returns for Kenneth and Anna Noel. These tax returns show an enormous increase in the salary, bonuses, and dividends taken by the Noels from Keystone in 1990 and 1991, as compared to other years.

Volume 2 contains Keystone's 1990 financial statement, which reflects the payment of a cash dividend in the amount of $1.4 million dollars in that year (this shows up in Kenneth Noels' 1990 income tax return in Volume 1); the 1990 financial statement of the Noels, which does not reflect the $1.4 million dividend; a 1990 appraisal of Flatbush Golf Course; a December 31, 1990 irrevocable trust agreement creating the Noel Family Trust; a December 31, 1990 Noel Family Trust determination establishing separate trusts for the four adult children of the Noels; an election by the separate trust set up for the Noels' son, Brian, to allow the trust to be a shareholder in the Flatbush Golf Course; a December 31, 1990 employment agreement between Flatbush and Anna Noel, pursuant to which she was to be paid $150,000.00 to perform unspecified duties; copies of checks drawn on the accounts of Kenneth and Anna Noel evidencing over two hundred and eighty thousand dollars in cash gifts to the Noels' four children in a three-year period between January 1991 and February 1994; the e-mail messages between Reed, Smith attorneys suggesting advice to the Noels about taking money out of the corporation; three checks, each dated August 26, 1991—a "dividend check" drawn against Keystone's account for $1.1 million dollars payable to Kenneth Noel, a check drawn against the Noels' personal account for $1.1 million payable to Flatbush,

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exhibits submitted by all parties, and this memorandum demonstrates that its decision is premised on relevant and properly admitted exhibits.

and a check drawn against Flatbush's account for $933,507.17 payable to Farmers Bank and Trust Company; minutes from an August 6, 1991, and a December 31, 1991 meeting of the Keystone board of directors (i.e., the Noels), authorizing $600,000.00 and $200,000.00, respectively, in cash bonuses from Keystone to themselves as officers of the corporation; closing documents for the $67,00.00 purchase of Florida property in 1993, by the Noels and their four children; and work papers from Flatbush's CPA showing, *inter alia*, that Kenneth Noel loaned Flatbush $80,000.00 in 1990.

Volume 3 of the Generator Defendants' exhibits contains a 1986 letter from the EPA notifying Kenneth Noel of his and Keystone's potential liability for the clean-up costs of the Site; a 1988 letter informing Kenneth Noel and Keystone of their opportunity to participate in the development of a Remedial Investigation (RI) and Feasibility Study (FS) for the Site; the EPA's July 1990 final RI for the Site; the EPA's ROD; EPA's December 5, 1990, notice letters to Keystone and the Noels informing them again of their potential liability for the clean-up of the Site, and informing them of their opportunity to perform the Remedial Design and Remedial Action (RD/RA) called for in the ROD; and EPA's June 28, 1991, administrative order under § 106(a) of CERCLA, directing the Keystone and Generator Defendants to perform the RD/RA called for in the ROD. These documents show that the Noels became aware in late 1990 of the actual amount of clean-up costs the United States would seek in connection with the Site.

Finally, Volume Four contains various financial and tax summaries prepared by one Brooks Gracie, the Generator Defendants' financial and tax expert, regarding Keystone, the Noels, and Flatbush. The final exhibit in Volume Four is Mr. Gracie's expert report. The expert report states, in sum, that the Noels conducted a scheme to transfer assets from Keystone to themselves and then to their children, relatives, and Flatbush, for the purpose

of avoiding potential liability for the clean-up of the Keystone Site, and that in doing so they substantially reduced the pool of assets available to satisfy any liability assessed against them or Keystone.

The documents in the Generator Defendants Volume 1 and 2 strongly support the Generator Defendants' claims of deliberate dissipation of assets by the Keystone Defendants. The three checks written on August 26, 1991, are particularly significant, especially when considered in light of other exhibits submitted in connection with the hearing. First, exhibit C to a brief submitted by Waste Management in this matter shows that the assets sale from Keystone to Waste Management was completed on June 18, 1991, pursuant to which Keystone turned over most of its operating assets to Waste Management in return for $3.1 million worth of Waste Management stock. Second, the Generator Defendants submitted a Butcher & Singer statement with their original motion for preliminary injunction, which shows that on July 31, 1991, Keystone sold 30,000 shares of this Waste Management stock for $1,112,977.00 in cash. (*See* Appendix M to Generator Defendants' motion for preliminary injunction). Third, Keystone Exhibit 29 shows that at the August 26, 1991, meeting of the board of directors of Flatbush (i.e., the Noels), they approved a personal "loan" from themselves to Flatbush in the amount of $1.1 million, and further approved the use of $933,507.17 of that amount to pay off a loan from Farmers Bank and Trust Co.

Thus, there is a clearly traceable line from the sale of Keystone assets to Waste Management, to Keystone's sale of the Waste Management stock, to the infusion of the proceeds of that stock sale into Flatbush. Flatbush, of course, was given to the Noels' four children on December 31, 1990, through gifts made by each of the Noels to the individual trust set up for each child. (*See* Volume 1, exhibit 17 (1990 gift tax returns for Kenneth and Anna Noel); Volume 2, exhibit 3, at 2.) There is a strong

likelihood that the wealth that was once vested in Keystone and the Noels is now largely contained in trusts for the Noels' children, while the Family Trust and the Noels' relationship to Flatbush as unsecured creditors suggests their continued control over the wealth.

The appraisal of Flatbush is also significant. It shows a computed value of $488,000.00 for Flatbush as of December 30, 1990. This value is based upon the following: the appraiser used the "income approach" for purposes of appraisal, which measures the net income produced or capable of being produced by a business. The appraiser stated that the income approach is appropriate for a going, profitable business. Using that approach, he estimated the business value of Flatbush to be $2,454,350.00, added cash and inventory available at the time, and subtracted liabilities in the amount of $2,073,481.00, to arrive at a rounded computed value of $488,000.00. He then calculated the per share value, based on a total 5,000 shares of stock. (*See* Volume 2, exhibit 3, at 4-8.)

However, in light of the additional evidence showing that the Noels "loaned" money to Flatbush, which was used to pay off more than $1 million in liabilities, the "income approach" appraisal of Flatbush is likely to be considerably higher now. In addition, the market or liquidation value is likely to be significantly higher, given that the golf course encompasses 178 acres of land, a clubhouse with pro shop, bar and grille, and locker room. Thus, the court finds its reasonably likely that Flatbush is holding a substantial portion of the Noels' and Keystone's former wealth.

The evidentiary value of the documentary evidence is heightened by Anna Noel's deposition testimony. As noted previously, the testimony of Ms. Noel was taken by deposition and submitted to the court after the preliminary injunction hearing. Ms. Noel admitted in that deposition that she and her husband owned and controlled Keystone and Flatbush. She indicated that the personal worth of

her and her husband was approximately $4.5 million as of December 31, 1990, which included over $400,000 in cash. She further admitted that their available cash was substantially lower as of January 30, 1995, because they had given away in excess of $300,000.00 since 1990.

Anna Noel also confirmed that as of December 31, 1990, Keystone was worth over $2.2 million, that she and her husband sold Keystone's operating assets to Waste Management for $3.1 million, and that today Keystone's only value is approximately $1.1 million in stock. She conceded that she and her husband took enormous sums out of Keystone in dividends and bonuses after 1990, and she conceded that they "lent" money to themselves from Keystone, and then "lent" it to Flatbush without requiring Flatbush to sign any loan documents. She confirmed that she and her husband gave Flatbush to the trust for her children. (Dep. of Anna Noel, at 64-87, 103.)[7] Mrs. Noel stated that she and her husband appointed her sister Mary Keller as trustee of the Family and individual trusts, which included responsibility for managing Flatbush, and more or less acknowledged that her sister had no experience in such matters. She also acknowledged that despite giving Flatbush to the trusts, she and her husband gave back to themselves approximately $900,000.00 in employment contracts, which they have not received, but remain entitled to as creditors of Flatbush. (Dep. of Anna Noel, at 97-100.)

Most important, although she doggedly evaded the questions put to her, Mrs. Noel ultimately conceded in essence that she was aware that the United States would

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[7] *See* Keystone Exhibit 29, which shows the $1.1 million dollar loan from the Noels to Flatbush, as well as a $600,000.00 loan from themselves to Flatbush in October 1990, $471.270.93 of which was earmarked to pay off Flatbush's loans at Farmers Bank and Trust Co. The remainder of that exhibit shows that the Noels' four adult children are now the shareholders of Flatbush, and that the Noels themselves are its Board of Directors, thus retaining control over the corporation.

be able to obtain large sums of money from her, her husband, and Keystone, and that knowing that, she put as much money as possible into trusts for her children. She repeatedly expressed the view that the government was trying to take away what she and her husband had worked a lifetime to build, and that it was only natural to try to protect those assets. (*See* Dep. of Anna Noel, at 88-97.)

The documents and Mrs. Noel's testimony satisfy the court that the Generator Defendants are likely to succeed in showing that the Keystone Defendants have transferred and will continue to transfer assets to avoid paying a potential CERCLA judgment, that they will be without funds to satisfy a CERCLA judgment absent injunctive relief, and that the Generator Defendants are likely to suffer irreparable harm of being saddled with the Keystone Defendants' share of joint and several liability if injunctive relief is not granted. All of this outweighs any harm that might come to the Keystone Defendants through a reasonably tailored injunction. Furthermore, the court finds that it is in the public interest to locate and preserve a reasonable pool of Keystone Defendant assets to satisfy any judgment against them.[8] Accordingly, the court finds that the Generator Defendants have satisfied their burden for obtaining injunctive relief against the Noels and Keystone.

C. *The Motions to Amend Crossclaim Against Keystone Defendants and Join Additional Defendants in Crossclaim and Enjoin Additional Defendants*

To facilitate their efforts at bringing the dissipation of assets issue before the court, the Generator Defendants seek leave to amend their cross-claim against the Keystone Defendants to assert a Pennsylvania state law claim for

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[8] The Keystone Defendants asserted that the public does not have an interest in ensuring that specific responsible parties assumes the cost of environmental clean-up, but are interested only in ensuring that some one bears those costs. The court does not agree.

fraudulent conveyance. Whether or not to grant a motion to amend is governed by Federal Rule of Civil Procedure 15(a), and the choice is within the sound discretion of the trial court. *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984). As Rule 15(a) itself directs, leave to amend "shall be freely given when justice so requires." This direction is to be liberally construed. *See Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 425 (3d Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982). A key consideration is whether the non-movant will be prejudiced by the amendment. *Id.* Denial of leave to amend may be required where there has been undue delay or other improper or bad faith conduct by the party seeking to amend, or where it is apparent that the amendment would be futile, as in, for example, the inability of the amendment to withstand a motion to dismiss. *Coventry v. United States Steel Corp.*, 856 F.2d 514, 519 (3d Cir. 1988) (citation omitted); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983).

Without belaboring the issue, the court perceives no prejudice or futility in permitting the amendment in this instance. Allowing amendment to assert the fraudulent conveyance claim is well within the scope of Federal Rule of Civil Procedure 15. Furthermore, doing so provides an additional vehicle for bringing into this litigation the full range of issues pertinent to dissipation of assets.

The court is also satisfied that the joinder in the fraudulent conveyance cross-claim of the Noel Family Trust, the individual trusts set up for the Noels' children, the Flatbush Golf Course, the Trustee of the trusts, and the Noel children in their individual capacities, comports with Federal Rule of Civil Procedure 13(h), and its incorporated standards of Federal Rule of Civil Procedure 19. Under Rule 19(a)(1), a court may join a person to an action if in the person's absence complete relief cannot be

accorded among the existing parties. The court does not believe that complete injunctive relief can be afforded the Generator Defendants without the joinder of these individuals and entities as additional crossclaim Defendants.

It follows that enjoining the joined crossclaim Defendants in some fashion is necessary to effectuate the injunctive relief to which the Generator Defendants are entitled. Given the relationship of these additional crossclaim Defendants to the Keystone Defendants, and the apparent lack of boundaries between the Keystone Defendants' assets and those of the additional crossclaim Defendants, they must be enjoined in order to reach certain assets disposed of by the Keystone Defendants. Absent some form of injunctive action against the additional crossclaim Defendants, the Generator Defendants will remain at risk of being burdened with the Keystone Defendants' share of the liability for clean-up costs at the Site. The goals of CERCLA will best be served by joining these proposed additional Defendants.

The court will not permit joinder of or injunctive relief against Mary Keller in her individual capacity, or Theresa Keller, as they appear to have received only a minor portion of the Noels' transferred wealth.

D. *Scope of Injunctive Relief*

The question of the proper scope of injunctive relief remains. The Generator Defendants request a complete encumbrance of all of the personal and corporate assets within the reach of the Noels and Keystone, as well as all assets once owned by the Noels or Keystone and now in the possession of Flatbush, the trusts, the Noels' four children, or Anna Noel's sisters. The court does not find that such extensive injunctive relief is necessary to protect the Generator Defendants from their threatened harm, given the maximum potential $11.9 million in liability, the number of other PRPs in this case, the likelihood that the Keystone Defendants would not be held liable for more

than fifty percent of the total liability, and the court's belief that Keystone and Flatbush are now capable of providing close to that amount to satisfy any judgment against the Keystone Defendants. Therefore, the injunction entered herein will reach only those assets now held by Keystone, Flatbush, and the trusts.

The court's decision rests upon the apparent fact that the Noels are very substantial creditors of Flatbush. By enjoining Flatbush until further notice from repaying loans to the Noels or paying large sums that may be due on their $900,000.00 in employment contracts, these substantial funds will be protected from dissipation. The court also will enjoin the transfer of any other Flatbush funds to the Noels, their children, or any other entity outside the ordinary course of business until further notice. The injunction will preclude any increase in salaries from Flatbush or the trusts to any Noel family member without permission of the court. The court will require the Keystone Defendants to submit a current financial statement as to the Flatbush Golf Course, Keystone, and the trusts immediately. Upon receipt of the financial statements, the court will decide whether and how to remove the cash representing the Noels' loans from Flatbush and preserve it for the payment of any potential judgment entered against the Noels. If the court's estimation of the total encumbered assets is erroneous, it will reconsider the amount encumbered. In the meantime, the instant injunction will preserve the status quo. To go further and enjoin the Noels' other personal assets would be overreaching, at least at this point.

For similar reasons, only the transfer of assets from the Noel Family trusts and the children's separate trusts will be enjoined at this time. For now, Flatbush is in the possession of the trusts, and therefore, their joinder is appropriate, along with the Trustee in her official capacity. The court declines to compel the return of the series of $20,000.00 cash payments made to the Noel children and Anna Noel's sisters, or otherwise further encumber the

personal assets of these additional defendants. The Noel children shall, nonetheless, be joined as additional Defendants in the fraudulent conveyance claim, as it may be that further action will be necessary. Although the court will not enjoin Mrs. Noel's sisters or the Noel children in their individual capacities, all parties are cautioned that the court will reconsider this decision if necessary.

In sum, the court will permit joinder in the fraudulent conveyance of all proposed additional defendants except Mary Keller and Theresa Keller is individuals. The court will enjoin all the Keystone Defendants and additional Defendants from any transfer or encumbrance of the assets or value of Keystone, Flatbush, or the trusts until further notice, but will permit the Keystone Defendants to suggest a mechanism for addressing the disbursal of ordinary business expenditures and salaries from Flatbush to the Noels and their children.

E. *Related Motions and Requests*

Several other matters must be addressed at this time. First, the United States submitted a memorandum supporting the Generator Defendants' motion for injunctive relief, but requesting the court to confirm the priority of the United States' claims against any encumbered assets. An order to that effect will be superfluous, given CERCLA's liability scheme. Nevertheless, the court will craft its order in this matter so as to reassure the United States.

Second, Waste Management also submitted a memorandum supporting the Generator Defendants' motion for injunctive relief, but requesting the court to clarify that the Keystone Defendants will not be precluded as a matter of law from making certain payments to Waste Management pursuant to indemnification provisions contained in the Keystone/Waste Management assets sale agreement. Waste Management emphasizes that nothing in CERCLA's liability scheme precludes indemnification agreements between a PRP and another party. This is undoubtedly true,

but it skirts the question of whether the court should allow an indemnified PRP to assert what would be essentially a priority of claim over the United States and other PRPs.

Waste Management cites a number of cases, which turned out not be instructive for the question at hand. The court believes, in any case, that Waste Management's position is fundamentally at odds with CERCLA's liability scheme, which provides that the Keystone Defendants will be liable, if at all, strictly to the United States, and jointly and severally with the other PRPs. The fact that CERCLA does not preclude indemnification agreements does not mean that CERCLA ensures a properly indemnified PRP that it will have a priority of interest in the indemnifying PRP's available assets.

To the extent that Waste Management might attempt to characterize its demands for indemnification as payments made in the ordinary course of business under the parties' August 12, 1994, stipulated preliminary injunction, it will be required to submit each claim for approval as required by that stipulation. The court will not enter a blanket order on behalf of Waste Management.

Third, the court will dispose of the Keystone Defendants' motion to continue the stay of this court's October 19 and January 13 orders concerning production of their attorneys' billing statements, pending the outcome of their writ of certiorari to the United States Supreme Court. Quebecor responded to this motion, arguing vociferously that lifting the stay was essential to permit the Generator Defendants to obtain additional information to support their dissipation of assets theory. Given the instant ruling, the court does not perceive an urgent need for those documents, and prefers to let the ruling run the course of appeal. Nonetheless, the court does not believe that the Keystone Defendants have satisfied their burden in this matter. A court should stay an order pending the outcome of a petition for writ of certiorari where there is: (1) a reasonable probability that certiorari will be granted; (2)

a significant possibility that the judgment below will be reversed; and (3) a likelihood of irreparable harm if the judgment is reversed, and is not stayed. *See Barnes v. E-Systems, Inc.*, —— U.S. ——, 112 S. Ct. 1, 2 (1991). The Keystone Defendants have not demonstrated any of these three requirements. Most obviously, they cannot show the likelihood of irreparable harm. The court's orders compelling production of the attorney billing statements were very narrowly tailored. If, in fact, there are billing statements tending to show that the attorneys advised the Keystone Defendants to take assets out of the corporation in light of the potential for CERCLA liability, it is other parties who stand to suffer irreparable harm, not the Keystone Defendants.

In any case, as to the other two factors governing the request for stay, the court found no compelling indication in the cases cited by the Keystone Defendants to suggest that this court's order is likely to be overturned. The court has been most patient and generous in granting stays to the Keystone Defendants on this matter up to this point, and finds that with the disposition of the preliminary injunction matter, and the pending judicial review, and the impending need to consider permanent injunction relief in this matter, the time is ripe to complete the discovery on this issue. Accordingly, the Keystone Defendants' June 21, 1995, motion to stay will be denied.

Finally, the Generator Defendants have asked to be excused from posting a bond for the preliminary injunction. That requirement is waived only in extraordinary circumstances, and the court sees no grounds for doing so in this case, especially where it will be shared among eight Defendants.

IV. *Conclusion*

The Generator Defendants' motions for injunctive relief and all related motions and requests, along with the Keystone Defendants' motion to stay production of documents,

will be disposed of in accordance with this memorandum. An appropriate order will be entered.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
Chief Judge
Middle District of Pennsylvania

Dated: August 14, 1995.

[Filed Aug. 14, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 1:CV-93-1482

(Rambo, C.J.)

UNITED STATES OF AMERICA,
Plaintiff

v.

KEYSTONE SANITATION COMPANY, INC.; KENNETH F. NOEL, individually and f/d/b/a KEYSTONE SANITATION COMPANY; ANNA M. NOEL, individually and f/d/b/a KEYSTONE SANITATION COMPANY; QUEBECOR PRINTING FAIRFIELD, INC.; C & J CLARK, AMERICA, INC.; THE ESAB GROUP, INC.; THE GENLYTE GROUP, INC.; HANOVER BRONZE AND ALUMINUM FOUNDRY, INC.; KEMPER INDUSTRIES, INC.; R.H. SHEPPARD COMPANY, INC.; and SKF USA, INC.,
Defendants

v.

ADVANCED DISPOSAL SERVICE, *et al.*,
Third-party Defendants

ORDER

And now, in accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT:

(1) The Generator Defendants' motion to amend crossclaim against Keystone Defendants is GRANTED;

(2) On or before August 31, 1995, the Generator Defendants may assert a fraudulent conveyance crossclaim against the Keystone Defendants;

(3) The Generator Defendants' motion to join additional defendants to amend crossclaim is GRANTED in part and DENIED in part;

(4) The Generator Defendants may join only the following entities and individuals as additional Defendants to the fraudulent conveyance cross-claim: Flatbush Golf Course, Inc.; The Noel Family Trust; the Bart F. Noel Separate Trust; the Brian K. Noel Separate Trust; the Lisa A. Noel Separate Trust; the Lori J. Noel Separate Trust; Bart F. Noel; Brian K. Noel; Lisa A. Noel; Lori J. Noel; and Mary E. Keller, in her capacity as Trustee;

(5) The Generator Defendants' motions for preliminary injunctive relief are GRANTED in part and DENIED in part;

(6) Subject to the conditions set forth herein, the Keystone Sanitation Company, Inc; Kenneth Noel; Anna Noel; the Flatbush Golf Course; the Noel Family Trust; the Bart F. Noel Separate Trust; the Brian K. Noel Separate Trust; the Lisa A. Noel Separate Trust; the Lori J. Noel Separate Trust; Bart F. Noel, Brian K. Noel, Lisa A. Noel, and Lori J. Noel; Trustee Mary E. Keller; and the officers, agents, employees, successors, and attorneys of Keystone Sanitation Company, Flatbush Golf Course, and the trusts named herein, are hereby enjoined until further notice from transferring, dissipating, encumbering, or otherwise adversely affecting the value of any cash, real or other property, or any other assets now in the possession of Keystone Sanitation Company, the Flatbush Golf Course, or any of said Trusts, except as specifically permitted otherwise herein;

(7) The injunction set forth in paragraph (6), above, is immediately subject until further notice to an ordinary business exception parallel to that set forth in paragraph (2) of the August 12, 1994, stipulated preliminary injunction between Keystone and the Generator Defendants, which shall apply to the business of Flatbush Golf Course,

and the named trusts, but which business exception is immediately further qualified as follows:

(a) Flatbush, its officers, agents, employees, successors, and attorneys, along with the additional Defendants trusts and Trustee, are hereby enjoined from repaying to Kenneth Noel and/or Anna Noel, in their personal capacity or otherwise, any loans made by either or both of them to Flatbush from 1990 to this date, or from paying any amount due on their $900,000.00 in employment contracts, without express permission of this court;

(b) Keystone, Flatbush, the Trusts, their officers, agents, employees, successors, and attorneys, and Trustee Mary Keller are hereby enjoined from increasing the salaries of, or otherwise disbursing additional funds other than current salaries outside the ordinary course of business to Kenneth and Anna Noel, the four Noel children, or the Trustee, from Keystone, Flatbush, or the Trusts, without express permission of this court;

(c) The August 12, 1994, stipulated preliminary injunction between Keystone and the Generator defendants remains in effect, and nothing in this order shall be construed as meaning otherwise;

(d) The enjoined parties shall have until August 25, 1995, to submit to the court any additional stipulations or modifications necessary to allow Keystone, Flatbush, or the Trusts to continue to operate in the ordinary course of business;

(8) The Keystone Defendants, Flatbush Golf Course, and each named trust shall submit to the court and the Generator Defendants, on or before August 21, 1995, copies of their most recent financial statements, along with any and all information now known to them or capable of being known to them through reasonable diligence, reflecting changes in their financial status since the preparation of the most recent financial statement;

(9) The Court will not enjoin additional personal assets of Kenneth and Anna Noel or their children at this time, or in the future, unless the funds that can be preserved through the instant injunction appear insufficient or otherwise incapable of satisfying a CERCLA judgment against the Keystone Defendants;

(10) The court will address the following additional matters after August 25, 1995;

(a) the formation of a more specific stipulated preliminary injunction to address the expenditure of funds as necessary to meet the business expenses of Flatbush and the Trusts, including any salaries of the Noels and their children;

(b) a court-appointed Trustee to oversee the assets enjoined through paragraph 6, above;

(c) the question of permanent injunctive relief.

(11) The injunctive relief granted herein has been provided for the sole purpose of allowing the courts to further determine whether and to what extent such assets must remain encumbered in order to ensure that the Keystone Defendants will be able to satisfy any joint and several liability to the United States and, secondarily, liability in contribution to the other PRPs, in this litigation;

(12) On or before August 21, 1995, the Generator Defendants shall post a bond with the Clerk of Court in the amount of $25,000.00;

(13) Waste Management of Pennsylvania, Inc. is not entitled to routine disbursement from Keystone Sanitation Company, Inc. on the basis of indemnification, but shall submit each request separately in accordance with the August 12, 1994, stipulated preliminary injunction; and

(14) The Keystone Defendants' June 21, 1995 motion to stay production of documents is DENIED, and the Keystone Defendants shall immediately produce the docu-

ments in accordance with this court's October 19, 1994 and January 13, 1995 orders.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
Chief Judge
Middle District of Pennsylvania

Dated: August 14, 1995.

Supreme Court, U.S.
FILED
SEP 21 1995
OFFICE OF THE CLERK

(3)

No. 95-273

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KEYSTONE SANITATION COMPANY, INC., *et al.*,
Petitioners,

v.

ARCATA GRAPHICS FAIRFIELD, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY TO BRIEF IN OPPOSITION OF RESPONDENT QUEBECOR PRINTING FAIRFIELD INC. (FORMERLY KNOWN AS ARCATA GRAPHICS FAIRFIELD, INC.)

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REPLY TO BRIEF IN OPPOSITION OF RESPONDENT QUEBECOR PRINTING FAIRFIELD INC. (FORMERLY KNOWN AS ARCATA GRAPHICS FAIRFIELD, INC.)

The Brief in Opposition filed by respondent Quebecor Printing Fairfield Inc. ("Arcata") attempts to cloud the reasons why this Court should grant certiorari in this case, and warrants a brief reply.

1. Arcata first claims that Keystone has not preserved for review the question presented in the petition. Opp. 10-12. The question presented is whether a party may be held to have waived its attorney-client privilege—even as

to undisclosed documents—as a result of the inadvertent disclosure of privileged material. *See* Pet. i. Keystone plainly raised that question both before the District Court and in its petition for a writ of mandamus filed with the Third Circuit. Before the District Court, Keystone raised the argument that the inadvertent disclosure of the two e-mail messages should not result in a waiver of its privilege as to the billing statements in responding to Arcata's motion to compel, *see* Pet. App. 14a, and in its own motion for reconsideration. *See id.* at 19a. The District Court recognized that the issue before it—"a difficult one"—was "whether a privilege has been waived on the grounds of inadvertent disclosure." *Id.*

Contrary to Arcata's suggestion, Keystone did not somehow abandon this issue before the Third Circuit. In its "Statement Of Issues Involved" in its mandamus petition, Keystone asked whether the inadvertent disclosure of the two e-mail messages waived the Keystone defendants' "attorney client privilege with their counsel concerning their rights and liabilities with regard to transfers of their assets." Petition for Writ of Mandamus 1. On the merits of the question, Keystone emphasized that the disclosure "Did Not Constitute A Waiver Of Privilege As To Any Other Document Or Testimony Because The Production Was Made Inadvertently And Not For The Advantage Of The Keystone Defendants." *Id.* at 14 (argument heading). Keystone focused on the consequences of the disclosure for the billing statements rather than the e-mail messages themselves because the e-mail messages were not at issue on the motion to compel and, as Keystone noted, "[t]o try to return the [e-mail messages] to a privileged status at this point would be like trying to unscramble an egg." *Id.* That practical recognition that the confidentiality of the e-mail messages—which were *not* at issue—had already been compromised in no way constituted a failure to preserve for this Court's review the question of the consequences of inadvertent disclosure on the privileged status of the documents that *were* at issue.

On the contrary, the legal question whether the inadvertent disclosure waived the privilege at all remained at issue in the case because it could very well have been determinative of the status of those documents that were the subject of the motion to compel. Thus, for example, in those courts holding that inadvertent disclosure cannot waive the privilege (the rule urged by petitioners), the motion to compel disclosure of the billing statements would have been denied on the strength of that rule without regard to the status of the already-disclosed e-mail messages. The fact that this dispute is not directly about the e-mail messages plainly does not, as Arcata would have it, make the split of authority on the effect of inadvertent disclosures irrelevant to a decision on the documents that were at issue on the motion to compel. Instead, as noted in the petition, this fact makes the case a particularly appropriate vehicle for resolving the conflict in the lower courts. *See* Pet. 24.

2. Although Arcata tentatively suggests in footnote that there "appears" to be no circuit split "as to whether an inadvertent disclosure *can* waive the privilege," Opp. 11 n.9 (emphasis in original), its effort to distinguish the cases discussed in the petition is unavailing. Contrary to Arcata's claim, the Eighth and Ninth Circuits have squarely held that an inadvertent disclosure does not waive the privilege. In *United States* v. *Zolin*, 809 F.2d 1411 (9th Cir. 1987), *aff'd in part and vacated in part*, 491 U.S. 554 (1989), a secretary disclosed certain tapes reflecting privileged communications, mistakenly thinking the tapes were blank. On the basis of that lone fact, the Ninth Circuit concluded that the disclosure was "sufficiently involuntary and inadvertent to be inconsistent with a theory of waiver." 809 F.2d at 1417. Other courts, moreover, have understood that "the Ninth Circuit * * * held in *Zolin* * * * that an inadvertent disclosure is not a waiver." *Georgetown Manor, Inc.* v. *Ethan Allen, Inc.*, 753 F. Supp. 936, 938 n.3. (S.D. Fla. 1991). *See also*

Comment, *Inadvertent Disclosure in the Age of Fax Machines: Is the Cat Really Out of the Bag?*, 46 Baylor L. Rev. 385, 391 (1994) (discussing *Zolin* as example of "no waiver" approach).[1]

Arcata's attempt to distinguish the Eighth Circuit's decision in *John Morrell & Co.* v. *Local Union 304A*, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991), is no more successful. There, an expert witness turned over privileged documents to John Morrell's union adversaries in a separate case; the Eighth Circuit held that "[t]he fact that the Unions inadvertently gained access to the [privileged] documents does not affect" their status as privileged documents. 913 F.2d at 556. It plainly *would* in the First or District of Columbia Circuits, and *might* in the Third or Fifth Circuits. *See* Pet. 7-8.[2]

Arcata more confidently elevates to text its assertion that there is no circuit conflict over whether an inadvertent disclosure of privileged documents waives the privilege as to other undisclosed documents, Opp. 12-13, but the

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[1] Arcata's reliance upon *United States* v. *Plache*, 913 F.2d 1375 (9th Cir. 1990), and *Weil* v. *Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18 (9th Cir. 1981), is misplaced, because both cases involved not inadvertent but deliberate disclosures. *See Plache*, 913 F.2d at 1380 ("Plache's disclosure * * * was not inadvertent. He purposefully testified about what Lipman had told him."); *Weil*, 647 F.2d at 23-25 & n.13 (corporate officer "voluntarily disclosed" counsel's advice during deposition).

[2] Arcata contends that the Eighth and Ninth Circuit decisions turned on the particular facts of the cases, Opp. 11 n.9, but the only fact that the court in each case found pertinent was that the disclosure was inadvertent. Arcata's claim that there is no circuit split also overlooks the decision of the Court of Military Appeals in *United States* v. *Ankeny*, 30 M.J. 10 (C.M.A. 1990), which held that an inadvertent disclosure does not waive the privilege. *See* Pet. 8, 23. Conflicts between decisions of the Court of Military Appeals and the regional Courts of Appeals are reason enough to grant certiorari. *See, e.g., Davis* v. *United States*, 114 S. Ct. 2350 (1994). Arcata makes no effort to respond to *Ankeny* in its brief.

point loses its force upon scrutiny. First, there is in fact a circuit conflict on the question, because three courts of appeals—the Eighth and Ninth Circuits and the Court of Military Appeals—find no waiver at all due to inadvertent disclosure, even as to the documents that were disclosed, and so *a fortiori* find no waiver with respect to undisclosed documents. Second, the breadth and depth of disagreement on the question of the consequences of inadvertent disclosure on undisclosed documents, even among those courts that find or may find a waiver as to the disclosed documents, plainly warrants resolution by this Court. *See* Pet. 8-9, 21-22.

Arcata's effort to minimize the conflict on the question presented is belied by the courts themselves. *See, e.g., Pavlik* v. *Cargill, Inc.*, 9 F.3d 710, 713 (8th Cir. 1993) ("Courts * * * have adopted three positions"); *United States* v. *Ankeny*, 30 M.J. at 17 n.6 ("[c]ivilian courts have taken varying positions on the inadvertent-disclosure problem") (citing circuit cases); *United States* v. *Zolin*, 491 U.S. 554, 573 n.11 (1989) (noting "controversy concerning the legal effect of an inadvertent disclosure which does not constitute a waiver of the privilege"). *See also* Pet. 10-13 (citing courts and commentators confirming the existence of the conflict).

In this case, Keystone was held to have waived the attorney-client privilege as to undisclosed, otherwise privileged materials because of the inadvertent disclosure of two privileged documents. That result would not have been reached in the Eighth or Ninth Circuits, in at least eight other federal districts not within those circuits, or in the military justice system. *See* authorities cited at Pet. 8-9. And the five-factor analysis employed below would not have been used in finding a waiver in the First or District of Columbia Circuits. *See id.* at 7. This Court should grant the petition to resolve this conflict.

3. In an attempt to distract the Court from the question presented, Arcata dwells on the facts of the underlying case, but the facts Arcata focuses on are not relevant to the legal issue before the Court. The question presented is whether an inadvertent disclosure of privileged material gives rise to a waiver of the privilege, even as to undisclosed documents on the same subject. It is undisputed that the e-mail messages were (1) privileged, Pet. App. 14a, 18a-19a; Pet. 5 n.4, and (2) inadvertently disclosed. Pet. App. 18a. No other facts are necessary to resolve the question presented.

4. There is simply no merit to Arcata's suggestion (Opp. 13-14) that the Third Circuit did not rule on the inadvertent disclosure issue. The Third Circuit expressly said that it was denying the petition for a writ of mandamus after consideration of petitioners' contention that the District Court "erred in finding that petitioners had waived their attorney-client privilege with regard to communications with their counsel concerning their rights and liabilities with regard to transfers of their assets." Pet. App. 5a. If the Third Circuit harbored some other, undisclosed reason for denying Keystone relief, that court will be able to address that reason upon remand from this Court, once the proper standards for evaluating the waiver claim have been established.

Nor is Arcata's contention that this case involves a discovery matter best left to the trial court's discretion well taken. Opp. 17. The question presented concerns the attorney-client privilege, and "this Court has a special duty to clarify aspects of the law of privileges properly before us." *Upjohn Co.* v. *United States,* 449 U.S. 383, 403-404 (1981) (Burger, C.J., concurring in part and in the judgment). In addition, several circuits do *not* agree that this issue is best left to the trial court's discretion. The First and the District of Columbia Circuits, for example, find a waiver of the privilege even if the disclosure

is inadvertent. The Eighth and Ninth Circuits and the Court of Military Appeals find no waiver if the disclosure is inadvertent. *See* Pet. 7-8. The issue is not regarded in those circuits, as Arcata would have it, as a "discovery ruling" "left almost entirely to the trial court's exercise of its discretion." Opp. 17. That is what the conflict is about, and why this Court should grant certiorari.

5. There is no answer in Arcata's brief to the point that an uncertain privilege "is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. *See* Pet. 16 . There is no answer to the dilemma posed by the existence of an ABA ethics opinion which "conflicts directly" with the law in those circuits allowing a waiver based on inadvertent disclosure. *In re United Mine Workers*, 156 F.R.D. 507, 512 (D.D.C. 1994). *See* Pet. 18. There is no answer to the clear trend among state courts to adopt the position urged by petitioners, and rejected by the courts below. *See* Pet. 19-20 n.15.

At the end of the day, the reasons why this Court should grant certiorari in this case are highlighted by what Arcata does *not* argue in its brief in opposition. Arcata does not dispute that there are entrenched conflicts in the federal courts over the question of the legal effect of an inadvertent disclosure; that the question is one of exceptional importance and arises with great frequency; that the disclosure of privileged materials in this case was inadvertent; and that the Court of Appeals denied Keystone's request for relief from the District Court's ruling that the inadvertent disclosure constituted a waiver of the privilege. These are conditions sufficient to warrant the granting of Keystone's petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

The National Bar Association ("NBA"), pursuant to Rule 37.2 of the rules of this Court, respectfully moves for leave to file a brief amicus curiae in support of the petitioners. Counsel for the petitioners has consented to the filing of this brief. Counsel for the National Bar Association has not received responses from all respondents to its request for consent, and is accordingly filing this motion seeking leave to file the attached brief.

The NBA, founded in 1925, is an organization comprised of over 20,000 lawyers, most of whom are

African-American, located across the United States and the world. The NBA's mission is to promote social justice for improvement of the educational, social and economic welfare of African-Americans and other socially and economically disadvantaged Americans. Although the issue presented in the petition for writ of certiorari may appear at first blush to be far removed from the ordinary concerns of the NBA, the NBA seeks leave to file its brief amicus curiae to provide the Court with an additional perspective on that question. From the NBA's perspective, the question presented in the petition implicates significant civil rights and social justice concerns because, under the decision below, legal doctrines frequently used to protect the disadvantaged in our society are subjected to lenient waiver standards and the protection afforded by those doctrines is thereby substantially undermined.

Accordingly, the NBA requests leave of the Court to file the attached brief amicus curiae in support of the petition.

Respectfully submitted,

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QUESTION PRESENTED

Whether the disclosure of documents subject to the attorney-client privilege waives the privilege with respect to those documents, as well as other undisclosed privileged documents on the same subject, where the disclosed documents were produced inadvertently by counsel and without the knowledge or consent of the client.

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---

BRIEF AMICUS CURIAE OF THE NATIONAL BAR ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

As explained in the foregoing motion for leave to file brief amicus curiae, the National Bar Association ("NBA"), founded in 1925, is an organization comprised of over 20,000 lawyers, most of whom are African-American, located across the United States and the world. The NBA's mission is to promote social justice for improvement of the educational, social and economic welfare of African-Americans and other socially and economically disadvantaged Americans. In the view of the NBA, the protections afforded by the attorney-client

privilege and the work product doctrine are invaluable to the exercise of legal rights by the victim and the disadvantaged in our society. Under the decision below, however, even an inadvertent production of privileged documents by counsel removes the protection afforded by the privileges. If widely accepted, such a holding would considerably reduce the willingness of many in our society to seek counsel to protect their legal and civil rights, and would consequently result in a lessening of the protection afforded by those rights. Accordingly, the NBA urges this Court to grant the petition and reverse the decision below.

SUMMARY OF ARGUMENT

As the petition itself explains, the lower federal courts are in disarray over the appropriate consequences of the inadvertent production of privileged documents, adopting three different approaches on the issue of waiver *vel non* and two different approaches on the scope of any waiver. *See* Petition at 7-13. That disarray and the costs it imposes are reason enough for the Court to consider the question presented in this case.

In addition, the NBA believes that the decision below provides inadequate protection for the fundamental civil right to seek the confidential advice of legal counsel. Although that right is obviously most important in criminal matters, where physical liberty is at stake, courts have long recognized the constitutional overtones that attend a litigant's selection of and consultation with counsel in civil matters. The value of the right to counsel is seriously diminished in a regime in which counsel consulted on a confidential basis may be deemed to have waived the privilege for the client

through mere inadvertence on the part of the counsel. In addition, the decision below further devaluates the right because any waiver is not narrowly circumscribed but rather extends broadly to communications on the same subject matter.

This Court should grant the petition and reverse the decision below to protect the privilege for communications with attorneys from all but voluntary and knowing waivers, and to emphasize that any waiver is to be narrowly construed.

ARGUMENT

This Court has long "recognized the attorney-client privilege under federal law, as 'the oldest of the privileges for confidential communications known to the common law.'" *United States* v. *Zolin*, 491 U.S. 554, 562 (1989) (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)). The "central concern" of the privilege is "'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *Zolin*, 491 U.S. at 562 (quoting *Upjohn*, 449 U.S. at 389)). *See also CFTC* v. *Weintraub*, 471 U.S. 343, 348 (1985). In order to vindicate that concern, those seeking legal counsel must be free to "make full disclosure to their attorneys," *Fisher* v. *United States*, 425 U.S. 391, 403 (1976), so that they may receive the fully informed "aid of persons having knowledge of the law and skilled in its practice." *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). *See also Trammel* v. *United States*, 445 U.S. 40, 51 (1980) (privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons

for seeking representation if the professional mission is to be carried out").

In explaining the importance of the attorney-client privilege, the force of what Justice Shaw said over 160 years ago is undiminished today:

> The principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of [attorneys] both in ascertaining their rights in the country, and maintaining them most safely in court * * * that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney should be forever sealed. [*Hatton* v. *Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833)].

In our society, those most in need of legal advice are frequently found in vulnerable positions--for example, facing criminal charges by state authorities or suffering discrimination at the hands of those who employ them. Because of their vulnerability, however, these individuals are reluctant to seek legal advice unless they can be assured that communications with counsel will remain confidential. Indeed, the guarantee that their consultations with attorneys will remain confidential is generally a prerequisite to the "full and frank communication between attorneys and their clients," *Zolin*, 491 U.S. at 562 (quoting *Upjohn*, 449 U.S. at 389), that the privilege is intended to foster. In the absence of a guarantee that their confidence will not be violated, those most in need of legal advice may well neither disclose their confidences nor receive the

informed advice of counsel. In that case, the "broader public interests in the observance of law and administration of justice" served by the privilege are substantially injured. *Id.*

Fortunately, attorneys can generally assure clients that communications with counsel for the purpose of seeking legal advice are closely guarded in our society. Rules of evidence, ethical requirements, and a variety of other protections permit the attorney to state with confidence that the client may speak freely without fear of disclosure and reprisal.

Under the rule adopted by the Third Circuit and other courts holding that an attorney's inadvertence might waive the client's privilege, however, an attorney seeking to reassure a client that the client may speak freely must join to that reassurance a caution that otherwise privileged communications can lose their protection if the attorney discloses them even through mere inadvertence. The attorney must also warn the client that not only the disclosed communications but also any communications on the same subject matter would then be subject to discovery by, for example, the client's employer in the context of a discrimination action. Far from providing the assurance likely to lead to full and frank discussion and advice, the attorney would be placed in the position of warning the client of the risks of unwitting disclosure. Transformation of the privilege from a strong protection that may be knowingly and intelligently waived by the client to one that crumbles in the face of an attorney's mistake will undoubtedly reduce the frankness of communications, the quality of legal advice, and ultimately the level of

justice afforded to those most in need of legal advice -- such as those seeking to protect their civil rights.

The rule urged the petitioners in this case, by contrast, "best serves the interests of the attorney-client privilege, as it protects the client from the apprehension that consultations with their legal advisors will be inadvertently disclosed and applies the privilege in a way that is predictable and certain." *Berg Electronics, Inc.* v. *Molex, Inc.*, 875 F. Supp. 261, 263 (D. Del. 1995). Once the apprehension of disclosure is removed by application of a predictable and certain rule governing waivers, those seeking legal advice will be significantly more likely to make full disclosure to counsel and, consequently, to receive the benefit of informed legal counsel.

Refusing to find a waiver based on an attorney's inadvertence also best comports with the longstanding recognition that "the privilege is that of the client alone," *Hunt* v. *Blackburn*, 128 U.S. at 470, and that the *client* must be the one to waive the privilege if a waiver is to be made. *Weintraub*, 471 U.S. at 348. Under the rule petitioners propose, the client will remain in control of disclosures, rather than being subject to unauthorized disclosures because of counsel's mistakes.

Finally, the Court should grant the petition to reaffirm the high standard of proof that is generally required to find a waiver of rights or privileges. As the petitioners note, Petition at 14-15 & nn.9, 10, this Court has recognized that civil litigants have a constitutional right to retain counsel by virtue of the Fifth and Fourteenth Amendments. Without the attorney-client privilege, that right "would in large part be rendered meaningless." *United States* v. *Schwimmer*, 892 F.2d

237, 243 (2d Cir. 1989). Given the importance of the right and the privilege, it is appropriate to find waivers only under the same circumstances in which constitutional rights generally are found to be waived, *i.e.*, when there has been "the *intentional* relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added). This well-established standard serves as a significant bulwark in a variety of circumstances against hasty findings that constitutional rights have been waived. If some rights or privileges may be waived through simple inadvertence of an agent, without any action by the person holding the right or privilege, that bulwark will be considerably eroded. In the view of the NBA, this Court should not permit that erosion to occur, but should instead jealously guard the high standard of proof that is applied to waiver questions. Only that standard provides adequate protection for fundamental constitutional and civil rights. This Court should grant the petition to reaffirm that those rights--including the right to counsel and the privilege that makes that right meaningful--may not be sacrificed through anything but intentional action.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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